UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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FAIRFIELD SENTRY LIMITED (IN LIQUIDATION), et al.,

Plaintiffs,

v. 12 MC 218(LAP)

HSBC PRIVATE BANK (SUISSE) SA, et al.,

Defendants.
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July 6, 2012
9:14 a.m.

Before:

HON. LORETTA A. PRESKA,

District Judge

APPEARANCES

BROWN RUDNICK LLP
Attorneys for Plaintiffs
BY: DAVID MOLTON
MAY ORENSTEIN
KERRY QUINN

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Attorneys for Defendant Andorra Banc Angricol Reig, S.A.
BY: W.M. SHAW McDERMOTT

SULLIVAN & CROMWELL, LLP
Attorneys for Defendant Standard Chartered Bank
BY: ROBINSON B. LACY

(Case called)

(In open court)

THE COURT: Mr. Molton?

MR. MOLTON: Yes, your Honor.

THE COURT: Good morning.

MR. MOLTON: Good morning, your Honor. We're glad to see you again today.

THE COURT: Nice to see you.

Mr. Moloney.

MR. MOLONEY: Good morning, your Honor.

THE COURT: Good morning.

Mr. Sushon?

MR. SUSHON: Good morning, your Honor.

THE COURT: And Mr. McDermott?

MR. McDERMOTT: Good morning, your Honor.

THE COURT: Good morning.

Mr. Lacy, good morning.

MR. LACY: Good morning, your Honor.

THE COURT: And good morning to everyone else.

Just by way of background, on Wednesday, June 27, 2012, the Honorable Burton R. Lifland entered a memorandum decision and order in the underlying case in the United States bankruptcy court granting the foreign representatives' motion seeking expedited initial disclosures. ("The foreign disclosure order"). Various defendants now seek leave of this

Court to appeal the foreign disclosure order on an emergency basis pursuant to 28 U.S.C. Section 158(a) and the Federal Rules of Bankruptcy Procedure 8003, 8005 and 8011(d).

On June 29, 2012, this Court granted defendants' request for a stay of the foreign disclosure order pending these proceedings. Accordingly, now pending before the Court are the following motions, each of which requests substantially identical relief:

The motion by the Cleary Gottlieb firm as attorneys for defendants HSBC Private Bank (Suisse) SA, and others, seeking leave to appeal foreign disclosure order and reversal of that order.

The motion by the O'Melveny firm as attorneys for defendants Credit Suisse International and Credit Suisse Luxembourg SA seeking leave to appeal the foreign disclosure order, reversal of that order or, in the alternative, the issuance of a writ of mandamus vacating that order.

The motion by the Sullivan Cromwell firm as attorneys for defendant Standard Chartered Bank seeking leave to appeal the foreign disclosure order, reversal of that order and dismissal of the underlying adversary proceeding in the bankruptcy court for lack of subject matter jurisdiction.

And a motion by K&L Gates as attorneys for defendant Andorra Banc Agricol Reig, SA, seeking leave to appeal the foreign disclosure order, reversal of that order, the issuance

of a writ of mandamus vacating that order, or in the alternative, clarification that the foreign disclosure order only applies to those parties and transactions about which the foreign representative has submitted actual subscription agreements.

The moving parties variously join in one another's motions and the arguments contained therein. Further, moving parties' motions are variously joined by defendants Falcon Private Bank Limited, Incore Bank AG and Maria Ferere as liquidator of Banco Atlantico (Bahamas) Bank & Trust Limited, as well as those defendants represented by the following counsel: Andrews Kurth; McKool Smith; Flemming Zulack Williamson &Zauderer; Harnick Wilker & Finkelstein; Hogan Lovells; Debevoise & Plimpton; SNR Denton; Sidley Austin; Becker Glynn Melamed & Muffly; Reiss & Preuss; Chaffetz Lindsey; Kramer Levin Naftalis & Frankel; Shearman & Sterling; Ropes & Gray; Cooley; King & Spalding; Davis & Gilbert; Bond Schoenek & King; Kleinberg Kaplan Wolff & Cohen; Beys Stein & Mobargha; Latham & Watkins; Gibson Dunn; Wrobel & Schatz; Morgan Lewis & Bockius; Baker & McKenzie; Kobre & Kim; Law Office of John J. Lynch; Dechert; Wilmer Cutler Pickering Hale & Dorr; Reed Smith; Wachtel Lipton; Weursch & Gering; Chadbourne & Park; Fried Frank; Wiggin & Dana; Willkie Farr & Gallagher; DLA Piper; Cravath; Katten Munchin Rosenman; Cadwalader; Arnold & Porter; Patton Boggs; Milbank Tweed;

Scheichet & Davis; Butzel Long; Moses & Singer; Withers Bergman, whose joinder is deemed timely nunc pro tunc; Linklaters, whose joinder is deemed timely nunc pro tunc; Tannenbaum Helpern Syracuse and Hirschtritt, whose joinder is deemed timely nunc pro tunc.

As stated in the Court's June 29 order, any defendants wishing to join in these motions were to have so indicated by 5:00 last Friday. At this time is there any other defendant who has not yet filed either a notice of appearance or formal joinder in the motions and wishes to join?

All right, then. Before we proceed, the parties are informed that one of my law clerks, Ryan Yanovich, is a former associate with O'Melveny & Myers here in New York and plans to return to that firm this September. Mr. Yanovich reminded me of this fact immediately upon the filing of O'Melveny's notice of appearance in this case. While an associate Mr. Yanovich performed no work on matters for the entities the firm represents in this case or in any matter related to this case, and he has no client confidential information regarding this case.

Any objections to his continuing to work?

MR. MOLTON: None, your Honor.

THE COURT: Thank you, counsel.

By way of background, plaintiffs Fairfield Sentry Limited, Fairfield Sigma Limited and Fairfield Lamda Limited,

(hereinafter the "funds") are three funds organized under the laws of the British Virgin Islands (hereinafter "BVI"). The funds sold shares to foreign investors and "invested" the proceeds with Bernard L. Madoff Investment Securities, LLC (hereinafter "BLMIS"). The funds' shareholders could redeem their shares at will.

After Madoff's fraud was exposed, the funds' "investments" were eviscerated. As a result, each of the funds entered in liquidation proceedings in either February or April of 2009 in the BVI.

The BVI courts appointed liquidators and foreign representatives of the plaintiffs. Beginning in April 2010, the foreign representatives began filing numerous lawsuits for plaintiffs in the New York State courts against these and other defendants. These defendants are generally banks and the unknown beneficial holders of the interests in the funds. Many banks purchased shares in the funds, and were the registered owners, then resold them to individual clients who were the beneficial owners of the shares. Plaintiffs originally made only state law claims for money had and received, unjust enrichment, mistaken payment and constructive trust. The theory of all these claims, however titled, is the same: Because of Madoff's fraud, the funds miscalculated the net asset value (hereinafter "NAV") of the shares, which resulted in inflated share prices upon redemption. Plaintiffs challenge

the transfers made to redeem shares because the amounts paid on redemption were allegedly too high.

On June 14, 2010, the foreign representatives commenced an ancillary proceeding in the bankruptcy court in the Southern District of New York under Chapter 15 of Title 11, United States Code, seeking recognition of the BVI liquidation proceedings as "foreign main proceedings." 11 U.S.C. Sections 1502(4) and 1515. That petition was granted on July 22, 2010. *Fairfield I*, 440 B.R. at 66.

After this, the foreign representatives began filing substantially identical claims in the bankruptcy court rather than in state court. To date, over 200 substantially similar lawsuits have been filed in the state and federal courts. After recognition, the foreign representatives under 28 U.S.C. Section 1452(a) removed the actions that had been filed in state court to this court which referred them automatically to the bankruptcy court. Not all of the actions were removed simultaneously. Now all of these lawsuits have been consolidated in the bankruptcy court.

Before recognition, the foreign representatives commenced in the New York State courts the 41 lawsuits against the present defendants claiming over $3 billion. These defendants filed the motions to remand or abstain in the bankruptcy court on October 4, 2010, arguing that the bankruptcy court lacked subject matter jurisdiction and that it

should abstain from hearing these cases. In addition, certain defendants claimed that the removal of the actions against them was untimely.

After the remand motions were filed, the foreign representatives amended 34 of the instant actions in January 2011 to include statutory claims under BVI law for "unfair preferences" and "undervalue transactions." These claims target transfers made within the vulnerability period under BVI law. Nevertheless, the essential facts to be determined are identical to the state law claims for mistaken payment.

On May 23, 2011, the bankruptcy court denied the remand motion. *Fairfield III*, 452 B.R. at 69. The bankruptcy court ruled that it had "core" bankruptcy jurisdiction under 28 U.S.C. Section 1334(a) "over the BVI avoidance claims in particular, and the actions as a whole" because they "directly affect this Court's core bankruptcy functions under chapter 15." *Id.* at 74, see *Id.* at 74-82.

In the alternative, the Court ruled that it had "related to" jurisdiction because the actions are related to the plaintiffs' chapter 15 case. *Id.* at 82. The Court also ruled that it would not abstain under either the mandatory or permissive standards. *Id.* at 83-86. It also sua sponte enlarged the time period for removal of the allegedly untimely removed actions and granted the foreign representative's

application pursuant to Section 108 of the bankruptcy code for a two-year toll of applicable statutes of limitations to bring suit against new defendants. *Id.* at 87-91. That toll took effect as of the date of Chapter 15 recognition, July 22, 2010, and, therefore, expires on July 22, 2012. *Id.* at 62-63.

This Court granted defendants' motion for a stay pending leave to appeal that order on July 14, 2011, and extended that stay of oral argument until a decision on the motion for leave to appeal was rendered.

On September 19, 2011, this Court granted interlocutory appeal from and reversed the decision of the bankruptcy court, denying defendants' motions for remand and/or abstention. See *In Re Fairfield Sentry Limited Litigation*, 458 B.R. 665 (S.D.N.Y. 2011). This Court overturned the bankruptcy court's determination that these actions are within its "core" bankruptcy jurisdiction, but did not reach the issue of "related to" jurisdiction. Instead, this Court remanded the case to the bankruptcy court for reconsideration of the mandatory abstention question. Having found all other factors in the mandatory abstention analysis to favor defendants, this Court directed the bankruptcy court to address the narrow issue of whether these claims can be timely adjudicated in the courts of New York.

In the meantime, on October 10, 2011, the BVI court awarded final judgment to defendants in the proceeding taking

place there. See Bankruptcy ECF Nos. 645-1, 741 (describing the October 2011 judgment of the BVI court).

On October 18, 2011, the bankruptcy court stayed all proceedings before it pending, one, the foreign representative's request for interlocutory appeal of this Court's September 19, 2011, ruling to the Court of Appeals for the Second Circuit; and two, his anticipated appeal of the BVI final judgment to the Eastern Caribbean Court of Appeals. That stay remains in effect with the exception of the foreign disclosure order now before this Court.

On March 1, 2012, the Court of Appeals for the Second Circuit denied the foreign representative's requested interlocutory appeal, and on June 13, 2012, the Eastern Caribbean Court of Appeals affirmed the judgment of the BVI Court. While the foreign representative appears to have informed the bankruptcy court that he is considering requesting leave for further appeal of the Eastern Caribbean Court of Appeals decision to the Privy Council of the United Kingdom, no such appeal is currently pending, as far as this Court is aware. See Bankruptcy ECF No. 741.

On or about May 25, 2012, the foreign representative requested that the bankruptcy court lift its stay and enter an order requiring disclosure from the named registered shareholder defendants of the identities and contact information of the unnamed beneficial owners of the shares, as

well as permission to amend the complaints to name those owners as defendants. Defendants objected to such an order on the grounds that the bankruptcy court had not yet reconsidered mandatory abstention prior to ordering discovery; that the bankruptcy court lacked subject matter jurisdiction and personal jurisdiction over the objecting defendants; and that the foreign disclosure order would require defendants to violate the bank customer confidentiality and privacy laws of some 30 separate countries under whose laws defendants are organized.

After briefing and a limited oral argument held June 26, 2012, the bankruptcy court issued the foreign disclosure order over the objections of several hundred defendants. Critical to the Court's reasoning in the order was the adoption of the foreign representative's arguments raised for the first time in his reply brief that a provision of the relevant form subscription agreements entitled "Office of Foreign Assets Control" (hereinafter the "OFAC provision") constituted a general waiver by the defendants of any bank customer confidentiality or privacy law compliance requirements.

On June 29, 2012, this Court granted a stay of the foreign disclosure order pending resolution of the requests for leave to appeal and, if granted, a decision on the merits of any appeal.

And so that's how we find ourselves here today, counsel.

For Mr. Moloney, the foreign representative states that we haven't really made out a case here for an interlocutory appeal. And I note in your papers, when you're talking about the pure question of law, you talk about comity, abstention, subject matter jurisdiction, personal jurisdiction, and then when you're talking about substantial grounds for difference of opinion, then you talk to me about the discovery order.

What's the issue for the interlocutory appeal, and why is an interlocutory appeal appropriate in this case?

MR. MOLONEY: Your Honor, I would say interlocutory appeal is appropriate for the following reasons.

And for the record, it's Tom Moloney on behalf of the defendants who were mentioned earlier.

This is not a standard discovery order in two respects. One is --

THE COURT: And you're talking now about the discovery order, despite what you put in the brief about pure questions of law, right?

MR. MOLONEY: Well, the order raises -- the legal questions go to the propriety of the order.

THE COURT: Okay. But in that section of the brief, you really didn't mention the discovery order.

MR. MOLONEY: Right.

THE COURT: Right. That's why I was confused.

MR. MOLONEY: Okay. Sorry about that, your Honor.

But we are focused on a discovery order, and we think the discovery order presents issues that this Court should review for two reasons. One is I think this Court has inherent jurisdiction to determine whether or not its order sending the case back to Judge Lifland had been followed. And so to the extent Judge Lifland did not follow your order to -- as a first order of business consider mandatory abstention, I think we can --

THE COURT: That has nothing to do with the discovery order.

MR. MOLONEY: Well, he had the discovery order remand and mandatory abstention. We've opposed the discovery order because we said he had to pursue -- if he was going to do anything in this case, the only thing he could do was mandatory abstention -- that was a threshold issue -- not enter the discovery order. And we think your Honor has inherent jurisdiction to enforce your own order, which was to remand the case and be sure of the first order of the business of the bankruptcy court was to focus on the remand issue, which your Honor has properly set up as a threshold issue that the Court needed to decide.

THE COURT: Even if I have inherent jurisdiction

doesn't mean that an interlocutory appeal is appropriate, right?

MR. MOLONEY: I think after *Stern v. Marshall*, your Honor, I think that the workload between the district court and the bankruptcy court -- I think courts need to -- district court is undoubtedly going to be thinking about what's the appropriate workload between the two. And I don't think the same standard, 1292(b) standard that would apply between this Court and the Second Circuit necessarily governs this Court and the bankruptcy court.

THE COURT: I didn't see that anywhere in your brief.

MR. MOLONEY: Well, it's exceptional circumstance argument, your Honor, that we've cited. The *WorldCom* case that, for exceptional circumstances such as an order which commanded this number of people here, that violates the laws of 30 countries --

THE COURT: The lawyers just want to come in on a Friday morning.

MR. MOLONEY: Your Honor, I think those exceptional circumstances -- I think this Court has power as a supervisory court to look at the 1292(b) standard through the lens of whether or not this is the type of issue that provides exceptional circumstances that you should review it. If we want to be --

THE COURT: Everybody knows that exceptional

circumstances are a reason for an interlocutory appeal.

But let me go back again. I mean, I think we have to do it -- let's do it on the three factors first, because that's what initially confused me.

MR. MOLONEY: Okay. On the controlling questions of law, I think the controlling question of law is the Court did not -- I have a hand-out, if I could, your Honor, that might help.

THE COURT: I can hardly wait. How many pages is it?

MR. MOLONEY: It's 18. Thank you, your Honor. I have a lot of extra copies for your law clerks.

THE COURT: Do your opponents have this?

MR. MOLTON: Judge, it was predistributed.

THE COURT: Oh, good. For everybody except me.

MR. MOLONEY: Sorry, your Honor.

Well, we anticipate your Honor's first question on the second page, your Honor, which is the fundamental errors of law, which is the -- and we think that these are three fundamental errors of law the Court may by entering. The discovery order, it does not first deal with the threshold issues, including the one your Honor directed the Court to consider.

Number two, it improperly read the subscription agreements, which then led it to basically, as a result of its improper reading the subscription agreements, it led it to --

failed to engage in the comity analysis that is required by Supreme Court jurisprudence and a jurisprudence of the Second Circuit.

THE COURT: Let me just ask you what you mean by that. You said that by improperly reading what the Court referred to as the consent provisions in the subscription agreement and the private placement memorandum, that led the Court to fail to undertake a comity analysis?

MR. MOLONEY: Right. Before --

THE COURT: I'm not quite sure I see the relationship there. I'm not sure it makes a difference, but I'm not sure I see the relationship.

MR. MOLONEY: The Court felt that because we had waived -- "we" being our collective clients -- had waived the rights under these privacy statutes, did not have to then engage into analysis of -- whatever those statutes' interests were sufficiently serious that they took precedence over the interest of the BVI in pursuing a claim, which is not yet recognized, which was really the --

THE COURT: I see, because the Court found that the defendants consented?

MR. MOLONEY: Your Honor, it's basically -- it was basically a Gordian knot that Judge Lifland cut through. He thought, but we think improperly, but misreading a provision of subscription agreement.

THE COURT: Okay. Go ahead.

MR. MOLONEY: So we think those were the fundamental errors of law. Then obviously in a case with this many parties involved, and with this much money involved, billions of dollars, the idea that you're going to nail -- complicate it by adding on hundreds of additional parties if they find the names of these beneficial owners -- because they're not proposing to substitute these people. They want to add these people as defendants --

THE COURT: So this is the pain in the neck argument.

MR. MOLONEY: Well, it goes to the question of wherever this is going to materially advance litigation by cutting through this, not adding these people, not getting into a collateral sanctions litigation, which is the next step, and appeals of the sanctions litigation; because I'll tell you now that for the number of jurisdictions, people will not comply with this order. And Switzerland, in Luxembourg, it's a very difficult decision as to whether or not these people go to jail if they comply.

So we're going to have collateral litigation. So that this could potentially cut through that Gordian knot, and it would be dispositive of the case, your Honor, if the Court goes back and applies the abstention analysis your Honor suggested they apply with the Second Circuit's additional learning in *Parmalat*, where even after the Court had actually decided the

case here, or it's a affected timely adjudication issue.

Here we have a situation where before they want to go forward, they may have an uncertain appeal in the Privy Council in England. There's no reason why this case cannot be officially litigated in state court, why we have to be in federal court here. So I think the abstention analysis is quite simple and that would dispose of the case.

So I think that satisfies the traditional 1292(b) standards, though I think in this case there are exceptional circumstances. The violation of the laws of all these countries, I think, would be appropriate to mandamus as well, but I don't think the Court needs to go that far because I think the relationship between the district court and the bankruptcy court allows for review, even when the relationship between the district court and the Second Circuit might have a different standard. I think --

THE COURT: Okay.

MR. MOLONEY: I think that's our position on --

THE COURT: Okay. Mr. Molton, what do you say on the interlocutory appeal issue?

MR. MOLTON: Good morning, your Honor.

And by the way, Judge, at various times my colleague, May Orenstein, on various issues will be assisting me and speaking to various issues, to the extent you raise them.

THE COURT: Okay.

MR. MOLTON: A number of things, Judge. You know, I don't believe Mr. Moloney has made a compelling case on the leave to appeal standard. I don't believe it exists here. And if I could just get to a number of things.

First of all, I just want to, for the sake of the record, because I think we sometimes conflate the remand cases with the other cases who are movants or joinders, the bottom line is whatever the remand argument is and how your Honor views it, it has no applicability to the vast majority of the defendants and actions to whom the disclosure order applies. And I think we gave your Honor some schedules to assist your Honor and your Honor's chambers in that regard. So when your Honor is talking about 41 cases in this room, there are many more than them.

THE COURT: I can see that.

MR. MOLTON: So in any event, your Honor, on the first, dealing with Mr. Moloney's pure -- we think with respect to the controlling question, there is no controlling question of law. Your Honor only has to go back to your decision from last year, when we were all here on a hot summer day, and your Honor I think remarked as well at the vast amount of folks here. We seem --

THE COURT: Vast number.

MR. MOLTON: Vast number. Thank you, Judge. Of folks here.

The bottom line is the issue of core or not, *Stern v. Marshall* are very different from the analysis that has to be taken vis-a-vis whether there's a conflict with the various issues of law, the various issues of foreign law which have been alleged and whether they have each defendant. And if your Honor turns to Exhibit A or --

THE COURT: By the way, now that you mention that, anybody who asks for 40 pages in a brief, gets it and then tells me that I adopt all these other briefs and appendices is really pushing it.

MR. MOLTON: Judge, we just referred you in a simple way to the record below. I apologize.

THE COURT: On an expedited motion. I know it's not your fault it's expedited, but a couple of examples would have sufficed.

MR. MOLTON: Okay. I'm sorry, your Honor. We were just trying to assist the Court on that. We could have annexed them to the declaration, and they wouldn't --

THE COURT: Even that wouldn't have helped me. The point is we're trying to get through this.

MR. MOLTON: Got it.

THE COURT: Okay.

MR. MOLTON: But the bottom line is that all of these issues require an evaluation of the record. And except maybe -- you know, just purely if Mr. Moloney refers to the

remand issue, and I'll get to that.

THE COURT: Refers to the?

MR. MOLTON: The remand issue. And I'm going to get to that first, your Honor. We believe that's a red herring. We've proffered to your Honor the various cases that say that while mandate is controlling as to the matters within its compass on remand, a lower court is free as to other issues. We cited Supreme Court cases on that.

THE COURT: Why don't we talk about what he said.

Mr. Moloney said, although he has it down on number two, that the fundamental error of law that defendants are complaining about is the bankruptcy court's supposedly incorrect reading of the subscription agreement consent.

MR. MOLTON: Okay. And to the extent, Judge, we can get to that, Ms. Orenstein can address those in particular, but let me take your Honor through that. We think that's wrong.

First of all, the subscription agreement was included in our moving papers. To the extent that my friends in the audience threw out bank secrecy laws, we, of course, then in the reply papers refer to the consent. So I just want to note that the subscription agreement was no surprise to the defendants.

And by the way, we have a situation here also where the defendants are kind of playing hide and seek because they have their records. They have in their records subscription

agreements, to the extent they -- we haven't found them. They may also have, and I'll get to it in a minute, your Honor, consent from their customers.

THE COURT: I read that footnote. I read the footnote.

MR. MOLTON: Good. Okay. But we haven't had a chance to --

THE COURT: But we're at the interlocutory appeal question now. And again, Mr. Moloney says that the incorrect reading of th OFAC provision is a pure question of law, etc., etc., etc.

MR. MOLTON: Judge, we think there's more to it than that. It requires an analysis of all of what was called the transaction documents, which in paragraph one of the subscription agreement includes the private placement memorandum as well as the articles of association, all of which shall --

THE COURT: Okay. But they say that that's misinterpreted also.

MR. MOLTON: Okay. Judge --

THE COURT: The private placement memorandum.

MR. MOLTON: Well, the private placement memorandum contains a clear provision. And we have a hand-out --

THE COURT: Well, we can get to that. We're talking about interlocutory appeal, whether we should all be sitting

here on a Friday morning.

MR. MOLTON: Judge, it is not a pure question of law. To the extent that it creates any requirement of contract construction that may include other provisions of the agreement, it may include, to the extent that your Honor disagrees with Judge Lifland and finds an ambiguity that requires a searching of the record, we believe that the documents tendered to your Honor create a situation where there is a record that has to be looked at on particular circumstances with respect to not only that one provision with that one heading above it, but in connection with the entire transaction and possibly the entire --

THE COURT: Well, in arguing to Judge Lifland, though, you only relied on the provisions in the subscription agreement. I think you didn't even rely on the private placement memorandum.

So your argument was that this is clean, and you, Judge Lifland, can do this without searching the record, without going to other transactions, without even going to other documents. Wasn't that your argument to him, and now you're changing your mind, tell me it's real complicated?

MS. ORENSTEIN: May I?

THE COURT: Ms. Orenstein, go ahead.

MS. ORENSTEIN: Your Honor, I believe that in our papers below we made reference to the private placement

memorandum.

THE COURT: Okay. But you didn't make an argument that this was a huge contract construction problem that was not relatively clear and simple. You argued it was clear and simple.

MS. ORENSTEIN: The point that we claimed was clear and simple -- I don't believe we said anything was clear and simple. It's actually a very complicated case, but --

THE COURT: I didn't say the case. We're talking about the issue, not the case.

MS. ORENSTEIN: The focus of our argument on the papers below was the failure of the defendants to meet their burden to establish an authentic conflict between foreign law and --

THE COURT: I'm talking about what Mr. Molton is talking to me about now. He's telling me that the question of law that Mr. Moloney relies on is far too complicated to be done on an interlocutory appeal. That's not what you people argued to the bankruptcy court. You urged the bankruptcy court to come to your conclusion.

MS. ORENSTEIN: We absolutely urged the bankruptcy court to deny the motion of the defendants, but we did so not on the basis of a pure issue of law, but because we had carefully reviewed on the individualized basis the arguments that were made in opposition to the motion based upon foreign

secrecy law. And we've --

THE COURT: Your position to the bankruptcy court on the interpretation, the contract construction of the subscription agreement, and you tell me the PPM as well, was that it's simple, can be done in the face of the document as opposed to what Mr. Molton just told me has to go into other transactions, search the record, blah, blah, blah.

MS. ORENSTEIN: I'm not trying to be evasive, but our arguments below were somewhat different and not entirely reflected in Judge Lifland's order. So to the extent that -- Judge Lifland's order, I agree with you, focuses on an interpretation of the subscription agreements. And I will mention in that regard that one of the factors Judge Lifland took into account in issuing the order on the basis of the subscription agreements was that the parties -- he perceived the parties to be financially sophisticated parties, banks. So that is a factual issue that Judge Lifland for his part included in his analysis and was relevant to his reliance upon a subscription agreement. For example --

THE COURT: So you think that there's a good faith question that these defendants aren't financially sophisticated? Is that what you're trying to tell me?

MS. ORENSTEIN: By no means.

THE COURT: Thank goodness. Okay. Good. I feel better.

MS. ORENSTEIN: I'm just indicating a respect to which the judge did not rely entirely upon a bald reading of the contract terms, whereas if the parties had not been sophisticated, he may very well have found that he could not --

THE COURT: If my mother had wheels, she'd be a trolley car. I'm only talking about the question of whether the reading of the so-called consent provisions is a pure question of law or not.

MS. ORENSTEIN: It's frequently said that the interpretation of a clear contract is a matter of law.

THE COURT: This, today, this --

MS. ORENSTEIN: Is a matter of law. And I would then, on that basis, find that the interpretation of a contract is a matter of law. I do not think that the fact that it is a matter of law, or even the fact that it may be a pure question of law, satisfies the requirement that it be a controlling issue of law under the jurisprudence relating to that factor on interlocutory appeal.

THE COURT: Well, if this is what they're complaining about, this is the order they say is subject to an interlocutory appeal, then we have to look at this one, right, and go through the other factors?

MS. ORENSTEIN: That's correct. But I'm referring to the fact that there is Second Circuit jurisprudence which I believe that we do cite in our brief that indicates that

contract issues, notwithstanding being questions of law, may not be of sufficient import or general significance to meet the standard under case law to be also a controlling issue of law.

THE COURT: Right. Might or might not.

MS. ORENSTEIN: Right, which is a term of art. And I will note in their brief that in their section on controlling issue of law, they -- and this is their brief seeking leave from you to appeal -- they did not identify the contract interpretation as the controlling issue of law. They identified two other issues.

THE COURT: You listen to my question. That's not fair.

MS. ORENSTEIN: They identified two other issues as controlling issues of law. The first was whether --

THE COURT: I got it. I got the whole thing.

All right. What else on this?

MS. ORENSTEIN: I'm sorry, your Honor. On the issue of -- there was an issue of law --

THE COURT: I want to understand what your position is on what Mr. Moloney just told me about interlocutory appeal.

MR. MOLTON: Judge, I'll move on. I do think, even reviewing the contract with respect to paragraph one, it does incorporate other provisions, other documents. And that informs the Court's interpretation thereof, especially with respect to the provision you're referring to.

And accordingly, if your Honor believes that Judge Lifland focused merely on one clause, that doesn't mean that that's the pure issue of law that something more vis-a-vis the contract has to be looked at. And I'll move on.

THE COURT: Well, okay. But you keep telling me maybe yes, maybe no. What's your position on why it's not?

MR. MOLTON: Well, Judge, we don't think it's a controlling question because there's -- we don't think that it will basically have any impact on the -- first of all, we don't think there's any substantial grounds for difference of opinion. And we don't believe also that it will materially affect, advance or dispose of the termination or the disposition of --

THE COURT: What about what Mr. Moloney said? If the disclosure is not made, then regardless of what happens on the merits, an enormous amount of ancillary litigation will be avoided. And the termination of the -- the resolution of this case will be significantly speeded up.

MR. MOLTON: Judge, I think that's all speculation. They had it in them to come forth and say, listen, we've got consents or we don't have consents. They don't say either. So to the extent they have consents, those consents would basically waive those very --

THE COURT: Perhaps, maybe, if. We don't know.

MR. MOLTON: But the bottom line --

THE COURT: But there's no doubt that if the foreign disclosure order were reversed, an enormous amount of litigation, even -- let's just say they cave and produce the information. Then you would be amending. Those parties would be coming in. We'd have a whole bunch of additional litigation. There can't be any serious question about that.

MR. MOLTON: That's fair, your Honor.

THE COURT: That's the way you want it to go?

MR. MOLTON: That's fair, your Honor, but I think that's -- you know, as we progress this litigation, that's what this litigation was going to be focusing on, is basically to the extent that defendants are going to be claiming that they're conduits and they have no liability to us, everybody knew that we would be seeking who --

THE COURT: What difference does that make in what we're talking about?

MR. MOLTON: Well, Judge, the bottom line is by not giving us this disclosure order now, we're severely handicapping the foreign representative. As your Honor noted, we have the --

THE COURT: Is that part of the interlocutory appeal analysis? I don't think so.

MR. MOLTON: No. The bottom line, Judge, is we don't think that there's been any material showing, any competent showing, other than speculation as to what might happen, to the

extent this disclosure order is granted. Indeed, your Honor -- and I think we've put in the papers before your Honor issued the stay -- we were getting communications from various parties to work things out.

And one of our declarations to your Honor, we tendered to your Honor, that we did, in fact, work out resolutions of these issues with various parties. All we're looking at, your Honor, is basically the progress of a material litigation dealing with a remarkable situation, a remarkable circumstance.

THE COURT: Sounds extraordinary to me.

MR. MOLTON: It is. It is. And you know --

THE COURT: Ms. Reporter, did you get that? Yes.

MR. MOLTON: And as your Honor knows, the same sort of issues in different guises or different issues are being played out with other aspects of Madoff related litigation. So we're all trying to do the best we can, those who have fiduciary duties to their stakeholders in progressing litigation for the benefit of those stakeholders.

THE COURT: May I ask you this please, Mr. Molton.

MR. MOLTON: I'm sorry, Judge?

THE COURT: Go ahead. Did you want to finish up?

MR. MOLTON: No. Lesson number one is never stop a judge from asking a question.

THE COURT: I sure hope all of my wonderful interns are listening to this. We talked about this yesterday.

Given what was before the bankruptcy court, you know, in the 8 billion and 12 affidavits from all these banks saying -- and the Swiss law experts and all these people, I understand Mr. Moloney also to be arguing that it was gross and disgusting error not to have engaged in the comity analysis prior to entering the foreign disclosure order. Do you say that is a pure question of law or not?

MR. MOLTON: No, Judge. That clearly is not, because in order for -- as your Honor knows from the case law we cited in our brief, in order for a comity analysis to be required, there has to be an actual conflict. And that's a case-by-case analysis. And I know your Honor doesn't want to refer me -- you don't want me to refer to Exhibit A again, but we tried to do that in Exhibit A to show the Court below -- go ahead. I'm sorry.

THE COURT: I guess I wasn't so clear why you were saying there wasn't a conflict. I read the portion in your brief about the affidavit from somebody or other on foreign law to the effect that if there was consent, then, fine, it's not a violation. But at least some of these people seem to think that there isn't consent and, thus, the foreign disclosure order, in fact, violates the various bank secrecy laws of all these countries.

MR. MOLTON: If I can ask Ms. Orenstein to respond to that --

THE COURT: Of course.

MR. MOLTON: -- because she has a handle on this.

THE COURT: She knows Exhibit A.

MS. ORENSTEIN: Okay. I believe that what your Honor is referring to as the sort of featured foreign law declarant in the brief is a gentleman by the name of Tissier, who was addressing his comments to case law which is referred to by a seminal case of *Tournier*. And *Tournier* establishes or sets forth the basic elements of bank law, of bank confidentiality and has been adopted in many of the common law jurisdictions.

With respect to the *Tournier* doctrine, a point was not actually bottomed on consent. With respect to the *Tournier* doctrine, our assertions was bottomed on the description of the doctrine as allowing foreign banks to produce confidential information or to be relieved of their obligation to hold information confidential based upon an order of a court of competent jurisdiction. And many of the common law defendants put in similar affidavits or joined in the declaration of Professor Tissier. And on that basis, we argue that they have failed to establish that there is a conflict between the order of the US court, which -- if it is a court of competent jurisdiction, and the bank confidentiality laws to which they're subject in the common law countries. So that was a declaration that we featured early in our brief.

Our arguments are somewhat different with respect to

the declarants who were opining with respect to civil law jurisdictions.

THE COURT: But even taking that declaration at face value, don't both the Supreme Court and the Second Circuit tell us that before entering such an order, the US court should engage in the comity analysis?

MS. ORENSTEIN: I don't think I agree with that statement, because I think if, in fact, foreign law provides that a foreign bank, a bank situated in Guernsey or the Bahamas or wherever it is, you may produce confidential client information in response to an order of a competent jurisdiction -- order of a court with competent jurisdiction, and that provided there exists such an order, there is no violation of foreign law. I think that eliminates the conflict.

THE COURT: So you think that the US court should engage in no analysis of the respective countries' interests; you know, the analysis that the Supreme Court talked about in the *Aerospatiale* case, how can that be? We should just pop off and say it's okay, so we don't care what their laws are, we don't care? No comity analysis at all, that's your position?

MS. ORENSTEIN: It's not an issue of not caring and no comity analysis at all. It's a question of proceeding as -- there's a first step, your Honor, and the first step is to identify the existence of the conflict.

Once there is a conflict, what does a conflict mean? The conflict means that the foreign party cannot comply with the US order and at the same time comply with the foreign law. It's between the rock and the hard place. That's the essence of the contract.

THE COURT: So is there any case interpreting the requirements for a comity analysis in the manner you suggest?

MS. ORENSTEIN: Yes, your Honor. I believe we cite to several cases in our brief stating that -- I'm being assisted here. Is this our brief below, to this Court?

THE COURT: What page are you looking at, ma'am, counsel?

MS. ORENSTEIN: We're not quite focused yet.

THE COURT: I was looking at 23 or thereabouts, 24.

MS. ORENSTEIN: Okay. I have I think -- okay. If your Honor would refer to page 16 of our brief before you, we cite to -- I have a quote from *Strauss v. Credit Lyonais*, 243 F.R.D. 199.

THE COURT: I didn't think that that enunciated the theory that you are espousing here. That is, that if the foreign entity could make the production pursuant to an order of a US court without liability, then no comity analysis was required.

MS. ORENSTEIN: Your Honor, I think that proposition that you just stated derives from combining the Tissier

declaration with cases that I'm having difficulty finding but I believe it to be the case -- and it could be Maxwell, there are other cases cited. I believe the issue is more extensively drafted in our motion before Judge Lifland, the point being the initial burden on the defendants to establish in the first instance the conflict.

And I do apologize. I heard your chiding with regard to the incorporation of the briefs below, but, in fact, in the order that the defendants provided to you in connection with this proceeding, they proposed that there would be no further briefing. And we would be relying on the papers below, and we thought it was appropriate. I really would --

THE COURT: Only to needle you a little bit, then why did you need 40 pages? But you don't have to answer that. That was a rhetorical question.

MS. ORENSTEIN: Actually, we'd be happy to answer it. I think the defendants covered a lot of issues. Many of them had different issues and different bases upon which they thought they're entitled to some relief. And we wanted to touch upon all of them.

But I would like to keep the record open during a break and identify, you know, for the record those other cases that we believe more directly address the issue of the two-step analysis that a court will undertake before reaching the comity issue, because we think, in fact, that it's a relatively well

established progression of analysis.

THE COURT: Thank you. Off the record.

(Discussion held off the record)

THE COURT: Mr. Molton, did you have anything you wished to add on the interlocutory appeal analysis?

MR. MOLTON: Judge, I think we dealt with the three things that Mr. Moloney talked about, remand, improperly reading subscription agreements and comity.

With respect to remand, I just want to refer back to the record. We tried in December to progress these cases to a point where the remand issue would then be opened up and heard by Judge Lifland and also the jurisdictional question would have been resolved. The defendants -- not only the remand defendants, but all defendants resisted that. And the stay was continued. And it is at the present date subject to the limited --

THE COURT: Remind me what you did in connection with that effort.

MR. MOLTON: Yes, Judge. In December 5th, the Eastern Caribbean Court of Appeals granted the foreign representatives sanction to continue and progress these actions. We have the order, I think it's part of our record but I have --

THE COURT: Just tell me.

MR. MOLTON: Okay. I have it here, if your Honor wants it. But what the Eastern Caribbean Court of Appeals did

is the companies in liquidation have sanction from that court to take such steps as are necessary to further prosecute expeditiously their common law claims in the United States and elsewhere.

And then paragraph two talks about expedite -- to take such steps as necessary to prosecute expeditiously in the United States bankruptcy court the BVI avoidance claim. So we abstained, even after the BVI court's preliminary issues judgment that happened in the fall of 2011, we abstained sanction from the presiding court to continue here with these cases.

THE COURT: So what did you do then?

MR. MOLTON: We then asked Judge Lifland to lift the stay in December of 2011. And that's part of the record that's in front of your Honor, part of the record on appeal, as well as referenced in our brief. And not only what I would call the bankruptcy court file defendants, but the remand defendants themselves said, oppose the motion, in a letter submitted on behalf of all of them by my friend Mr. Moloney.

At that point in time there was an appeal pending in the Eastern Caribbean Court of Appeals, and there was also, as your Honor knows, your Honor granted us 1292(b) certification to proceed to the Court of Appeals. And that was still pending at that point as well. Judge Lifland wrote status quo, continued basically on the stay order that he had issued in

October. So we had wanted to progress these cases and deal with all of these issues.

THE COURT: Let me ask you this: We're going to get to this -- we might get to this later on. This is not really an interlocutory appeal question, but since you mention it, one of the points the defendants make is that the reason we're in such a time bind now is that the foreign representative failed to proceed through the Hague Convention for this very discovery. What prevented the foreign representative from doing that?

MR. MOLTON: We didn't think we needed to. And I'm going to let Ms. Orenstein proceed.

MS. ORENSTEIN: Your Honor, before addressing that issue, belatedly I'd just like to identify on page 20 of the brief, 21 of our brief before this Court, the citation to *British International Insurance v. Seguros La Republica*, 2000 WL 713057 at page 21, a party resisting disclosure on the basis of foreign law, quote, has the burden of showing that such foreign law actually bars the production at issue.

And then similarly, another cite to *Shanghai Bank Corp.*

THE COURT: Got it.

MS. ORENSTEIN: With respect to the Hague Evidence Convention, the law is quite clear that it is not mandatory in all circumstances, that it --

THE COURT: Everybody agrees to that. The question is, why didn't we wait? We're now yelling and screaming about the statute of -- the toll running out July 22. We could have done this two years ago.

MS. ORENSTEIN: For several reasons. First of all, we don't think that the procedures under the Hague Evidence Convention are really appropriate to the very limited and targeted disclosure that we sought here.

THE COURT: What does that mean?

MS. ORENSTEIN: The Hague Evidence Convention appears to be more typically used to develop -- to get extensive documents to obtain --

THE COURT: That's not an answer. You want simple little answers. Why is it not appropriate to use the Hague Convention for that?

MS. ORENSTEIN: I believe that for purposes of what is conceived of as preanswer and limited, targeted discovery, that the Hague Convention is not generally used.

THE COURT: Who cares? It may be, right?

MS. ORENSTEIN: Well, another consideration that we took into account was that not all of the defendants are in countries that are subject to the Hague Evidence Convention.

THE COURT: But most of them are.

MS. ORENSTEIN: Many of them are, but quite a few of them are not. So --

THE COURT: So then we limit it as to none.

MS. ORENSTEIN: Certainly expense was an issue that we would be, you know, commencing any number of proceedings in foreign countries that were not necessarily likely to be productive.

And that is another issue, your Honor, similar to the issue I discussed before, is that courts have repeatedly found that the defendants have a burden of indicating that production will, in fact, be productive under the Hague Evidence Convention. And here, based upon our analysis of the issues, we determined that many of the same bank secrecy objections could be advanced in the context of the Hague Evidence Convention so that we could -- in other words, it's a different set of procedures. It's not necessarily an open sesame to be able to get past the very same objections that we're facing in this court. And that was another point that went into our consideration of not proceeding with those -- with that process.

And the other, your Honor, is frankly, we think that we are differently situated in this case, based on the subscription agreements relative to defendants in other cases, where courts have more heavily weighed or more heavily taken into account the argument based on the Hague Evidence Convention. In this situation --

THE COURT: What does that mean? Does that mean

because you say you have consent here, it's better?

MS. ORENSTEIN: We do believe that because we have --

THE COURT: Does it mean something other than that?

MS. ORENSTEIN: Well, it's one little addition to that. We have consent to jurisdiction, so we have a contractual commitment to litigate in this jurisdiction.

And in addition, we have an agreement that states that it's governed by New York law. And I think that we can say that essentially the decision between the Hague Evidence Convention and the Federal Rules of Civil Procedure is fundamentally an issue of what procedures are applicable to a particular proceeding. And we feel that it's a completely legitimate argument to say that where a party has contractually committed to the US as a jurisdiction to litigate a claim and, moreover, has contractually committed that US law will apply to that claim, that there is a distinction in that situation to other situations where courts, in weighing the various factors, have insisted that the party seeking discovery proceed through the Hague.

THE COURT: Okay.

MR. MOLTON: Judge, if I may just add to that for one second.

As stated, 221 of the 230 objecting defendants signed the long forms. Now, whatever argument is said about, well, very few number that -- there may be different provisions

vis-a-vis consent. I think that was raised by a number of what we call special circumstance defendants. All of them have the consent to jurisdiction clause that Ms. Orenstein mentioned. And accordingly, I just wanted to note that for the record.

The remaining nine objectors, five are in the United States and there's four remaining.

THE COURT: Okay.

MR. MOLTON: So that's where we are.

THE COURT: Anything else on interlocutory appeal?

MR. MOLTON: I think I'm done. Just one more -- I hit my remand point, Judge. And I know Mr. Moloney said that they're going to be subjected to all sorts of horrible, horrible things in Switzerland and elsewhere. My understanding, it's their burden to come forward in their papers below with that evidence. It's my understanding they didn't do so. So I know Mr. Moloney likes to say that, but there's no proof of that.

THE COURT: Thank you.

Mr. Moloney, what else do you want to say on interlocutory appeal? Counsel says that you haven't come forward below with evidence that making the production required would subject your clients to heinous results.

MR. MOLONEY: Actually, the only evidence below on that point was from our expert witnesses, your Honor. And if you go to -- this may be helpful, page 15 of our slide, we

quote here for the next three pages the specific portions of the declarations that are in the record that go specifically to this issue. Beginning with Switzerland, where we have two declarations, one by Professor Luc Thevenoz and one by Professor Alain Macaluso, who say that we will violate Swiss law.

We also have a letter which is in the record as exhibit to Mr. Keeley's declaration from the Swiss government saying we will violate the law, in this case by producing the documents in Switzerland. So I don't believe as to Switzerland there can be any particular question. We have the Swiss government and we have two experts. There's no evidence of any sort on the other side, other than what they relied on below, which is this waiver language in the agreement.

THE COURT: All right.

MR. MOLONEY: Which your Honor correctly identified as a controlling issue of law.

THE COURT: Anything else? Go ahead.

MR. MOLONEY: The debt on Luxembourg, same situation. We have two expert witnesses. Again, these are criminal statutes so that the jurisprudence here in the Second Circuit is that this indicates a very strong -- comity interest aside, these are not blocking statutes.

THE COURT: That was Judge Pollock's case. He seems to be hidden by the screen here, but he's looking at you.

MR. MOLONEY: And those are not blocking statutes. And the section -- you know, so I think that I think -- we have more obviously in our briefs in here, but we've done it for every single jurisdiction, we've shown that there's an actual conflict and there's no declarations on the other side.

Second point I would make, your Honor, is the other fundamental issue of law that's here is the failure to consider threshold issues. And it's not simply abstention; it includes abstention. And on the abstention issue, I think they're just playing fast and loose with the Court, frankly. They moved for Judge Lifland to --

THE COURT: May I defer this discussion until we get, if we get farther. I want to know if you have anything else to say on interlocutory appeal, please.

MR. MOLONEY: Well, just that a threshold issue is a fundamental issue. And putting aside abstention, when they referred to the fact that the Court had jurisdiction in the common law state that may provide a protection, we would have to decide whether we have jurisdiction. The very first step of the comity analysis requires you to decide if you have jurisdiction. Until a state finds it has jurisdiction over the clause and the person, you have no comity analysis.

And so that is the threshold question. The Court skipped that step. Then it skipped the second step, which is to go do the comity analysis. The cases they point you to, and

I commend you to look at them -- I'm sure you will -- the Credit Lyonais case.

THE COURT: You commend me.

MR. MOLONEY: The Credit Lyonais case they refer to, my partner, Larry Friedman, litigated. The Court engaged in extensive comity analysis. They've gone to the end of comity analysis, because the Court concluded something. It didn't do analysis. It went through an analysis. In order to reach the conclusion that the order will be okay and that you're not going to offend foreign law, you need to do an analysis. The Court completely skipped that step. So that was the second fundamental error of law.

And obviously your Honor is correct, and we apologize, we should have put it in that section of our brief, but obviously the misreading of the document is a fundamental error of law. Those, I think, are the only thing I would add. And I'm not sure it goes to the fundamental error of law point, but if we ever get to the later points, the Madoff trustees using the Hague Convention for the very purpose they're seeking discovery here. And it's obviously US law, the Hague Convention, so that we think failure to use the Hague Convention was never part of the fundamental error of law of skipping this comity stage.

THE COURT: Okay. Counsel, we'll take five minutes and I'll see you back here then.

(Recess)

THE COURT: Apparently we all agree that this Court has discretion to grant an interlocutory appeal of an order of the bankruptcy court. 28 U.S.C. Section 158(a)(3). In exercising that discretion, courts have looked for guidance to 28 U.S.C. Section 1292(b) and have granted such leave where, A, the order involves a controlling question of law; B, there is a substantial ground for difference of opinion; and C, an immediate appeal may materially advance the ultimate termination of the litigation.

In re Adelphia Communications Corp. 333 B.R. 649, 658 (S.D.N.Y. 2005). "The 'question of law' must refer to a 'pure' question of law that the reviewing court could decide quickly and cleanly, without having to study the record. The question must also be 'controlling' in the sense that reversal of the bankruptcy court would terminate the action or, at a minimum, that determination of the issue on appeal would materially affect the litigation's outcome." *Id.* A "substantial ground for a difference of opinion must arise out of a genuine doubt as to the correct applicable legal standard relied on in the order. Substantial ground would exist if the issue is difficult and of first impression." *Id.* at 658-59. Normally, leave to appeal is granted where "exceptional circumstances" are present. *Id.* at 658.

The Court is mindful that interlocutory appeal from

discovery orders is generally disfavored. See *Chase Manhattan Bank N.A. v. Turner & Newell, PLC*, 964 F.3d 159, 166 (2d Cir. 1992). However, this presumption can be overcome either by satisfaction of the Section 1292(b) factors or a showing of "manifest abuse of discretion." See *Xerox Corp. v. SCM Corp.*, 534 F.2d 1031, 1031-32 (2d Cir. 1976).

The Court is convinced that the dispute over the need for the bankruptcy court to undertake an international comity analysis before ordering foreign discovery is a "'pure' question of law that the reviewing court could decide quickly and cleanly without having to study the record." See *In re Adelphia Communications Corp.*, 333 B.R. at 658. Moreover, there is "genuine doubt as to the correct applicable legal standard relied on in the order," *Id.*, insofar as precedence in the United States Supreme Court and the Court of Appeals appear to compel the comity analysis defendants seek, see e.g., *Societe Nationale Industrielle Aerospatiale*, 482 U.S. 522, 543-44. & n.28 (1987): *United States v. First National City Bank*, 396 F.2d 897, 902 (2d Cir. 1968) (Where two states may enforce their respective rules of law, "each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction" should the comity factors be met); see also *In re Maxwell Communications Corp., PLC v.Homan*, 93 F.3d 1036, 1048 (2d Cir. 1996) ("Comity is especially important in the context of the bankruptcy code.").

The Court is also aware that these precedents require the finding of a true conflict of law. *Aerospatiale*, 482 U.S. at 555 (Blackmun, J., concurring in part). That is, of course, itself a question of law. In this case it is made no less so by the bankruptcy court's reliance on the language of the form subscription agreements. That language is readily reviewable and is not the sort of contract construction that would require this Court to delve extensively into the case record. *Compare with Bank of New York Trust NA v. Franklin Advisors, Inc.*, 674 F.Supp. 2d 458, 474 (S.D.N.Y. 2009) (discussing appellate review of contract construction involving significant issues of disputed material fact.) It also does appear that this language was the sole basis on which the bankruptcy court declined to undertake the comity analysis at issue.

The same "genuine doubt" exists as to the ability of the bankruptcy court to order foreign disclosures without first addressing the threshold questions of subject matter jurisdiction and mandatory abstention. Federal courts are courts of limited jurisdiction and "the validity of an order of a federal court depends upon that Court's having jurisdiction over both the subject matter and the parties." *Insurance Corp. of Ireland Limited v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982); see also *Southern New England Telephone Company*, 624 F.3d 123, 132 (2d Cir. 2010). This Court has already cautioned in this case that "there are substantial

grounds for differences of opinion not only with respect to the bankruptcy court's determination as to jurisdiction, but also with respect to its determination as to abstention" and that "the determination of subject matter jurisdiction is not only of utmost importance in federal court, but also would materially affect the litigation's outcome." See *In re Fairfield Sentry*, 458 B.R. at 673; see also *Wynn v. AC Rochester*, 273 F.3d 153, 157, (2d Cir. 2001). That defendants did not object to prior orders of the bankruptcy court after the original remand, including the stay of proceedings there pending appeal, is of little relevance owing both to the respective natures of the orders and their consequences. In any event, whether denominated a formal ruling on the subject matter jurisdiction motions or not, to the extent that a finding of subject matter jurisdiction is step one in a required comity analysis, the questions are interrelated.

Also, as counsel acknowledge, this Court need only apply the Section 1292(b) factors as guidelines and has discretion to grant such an appeal in "exceptional circumstances." See *In re Adelphia Communications Corp.*, 333 B.R. at 658; *In re WorldCom Inc.*, 08 Civ 10354, 2009 WL 2215296 at *3 (S.D.N.Y. July 23, 2009). The Court agrees that in light of its prior order remanding this case for a determination on mandatory abstention, the defendants' ongoing challenge to both subject matter and personal jurisdiction, the affirmed

dismissal of the foreign representative's claims in the BVI courts, the colorable dispute over the bankruptcy court's interpretation of the subscription agreement language and the overarching specter of compelling foreign discovery that could violate as many as 30 international banking privacy regimes, such circumstances likely exist here.

In short, this case presents the sort of exceptional circumstances other courts have found when granting such a motion. See *In re DPH Holdings Corp.*, 437 B.R. 88, 93-94 (S.D.N.Y. 2010). Accordingly, the court grants the defendants' motions for leave to appeal.

Mr. Moloney, what would you need to talk to me about on the merits?

MR. MOLONEY: Yes, your Honor.

THE COURT: One of the things I'd ask you to cover, if you would, is your point about where you ask and others ask the Court to instruct the bankruptcy court on the sequence in which the bankruptcy court should address the various outstanding issues. I'm not so sure I'm aware I have authority permitting this Court to do that, but you can start wherever you want.

MR. MOLONEY: That's a good place to start, your Honor. And actually, I have a slide that kind of talks about that.

THE COURT: I can hardly wait.

MR. MOLONEY: If we look at slide 6, Justice Ginsberg

writing for a unanimous court in *Sinochem* basically held that in order to determine which one of the audience denying routes that the Court could take, whether it be forum non conveniens, abstention, jurisdiction or subject matter jurisdiction, that basically the court could do whatever is most convenient to it. And she cites with authority a decision by the -- I think was a DC circuit involving -- and we did not cite that in a brief but it's actually where the quote comes from -- substantive law declaring power. And I read it yesterday in Papandreou, who's a Greek Prime Minister, where what the DC circuit said was basically the lower court should use some sort of triage and decide what's the easiest one to decide. And whatever is easiest to decide in order to eliminate it, the Court has discretion to do that.

So, your Honor, unless your Honor was to decide these issues yourself -- which I think would be your prerogative, particularly on the abstention issue -- but if you directed it back to Judge Lifland, I think he could have discretion, but he'd have to use that discretion to go through the issue that's easiest to decide, which I think is going to be the abstention issue. I think it would be an abuse of that discretion to go to a more complicated issue such as subject matter jurisdiction.

THE COURT: So do we agree that it is not clear that this Court can order or should order the bankruptcy court what

order in which to resolve the various issues pending before it?

MR. MOLONEY: With one caveat: In the Papandreou case, and I think that probably applies here, when the DC circuit, they were reviewing the court below by mandamus, they said, the one issue you should decide first is you should decide your power before you decide comity. And I think it also makes sense here, that before you decide --

THE COURT: But is that related to the fact that included in the comity analysis is whether or not the Court has jurisdiction?

MR. MOLONEY: I think that's right. It's the very first step of the analysis, so I think -- so that -- but that could end the question. Since it's part of the analysis, I think the Court should decide its -- I think the comity issues only -- and the restatement section, which your Honor quoted from, it starts right before the section you quoted by saying, when two states are charged with jurisdiction over a matter. So I think you start there. And if the Court finds that there's no jurisdiction, it doesn't need to go further.

So I think that's the starting point. And I think the rational starting point there would be unless the bankruptcy court believes it can dismiss the case more easily by starting somewhere else, it's abstention, then subject matter jurisdiction, then personal jurisdiction. But I think if the bankruptcy court could dismiss the case more easily by jumping

to personal jurisdiction, I think the law is it has that discretion.

THE COURT: Okay. As I noted, the sole basis on which the bankruptcy court ruled was its reading of the language primarily in the subscription agreement, but the language which it held constituted a consent to the disclosure. Would you like to talk to me about that?

MR. MOLONEY: Yes, your Honor. And if -- I have that language on page eight of -- actually, I have that language from page nine, slide on page nine.

And actually, before I even focus on that language, let me deal with it, an argument that was an implicit waiver by simply having these arrangements. That which is another argument which they make, and I'm sure they'll raise when they stand up, is even if this language isn't a waiver, simply by entering into these agreements there's a waiver. These agreements were carefully structured, your Honor, in order to permit and to recognize the foreign privacy laws. And the private placement memorandum, which I don't know why they find any solace in that whatsoever, but if you looked at pages 25 and 26 of that memorandum, which is attached to their papers and opening pages --

THE COURT: I have it.

MR. MOLONEY: -- it indicates that if investments made by a qualified financial institution, which all of our clients

are. I think everyone in this room is probably a qualified financial institution. If you do that, then you don't need to give any of the information. So that these investments are set up to permit anonymity and to respect foreign bank secrecy laws. That's the way they're set up, to say that implicit in entering into this arrangement was some waiver of privacy is completely contrary to the whole way this was marketed or set up. It was set up deliberately for foreign banks basically to be able to bring their clients into these investments without disclosing their identities. That was the way this BVI entity set up this.

Now, the specific language which they look at, they say that we should have anticipated the argument that this language could be read as a waiver. But it's not that all those law firms you mentioned at the beginning of this case were unable to read this language. I don't see how anyone could possibly read this language that way. And I still don't understand how Judge Lifland read the language that way.

THE COURT: Okay.

MR. MOLONEY: I think the language is pretty clear.

THE COURT: Why don't we ask counsel to explain why it is he says Judge Lifland was correct.

MR. MOLONEY: Can I make one more point first?

THE COURT: Sure.

MR. MOLONEY: Just to get it out of the way. The

argument --

THE COURT: Only because it's not useful to say I don't understand how we can do this.

MR. MOLONEY: Sorry, your Honor.

The other two points, then, I would say, is that if you look at the slide ten, which is the other language he's relying on, they're basically saying, look, we don't have a remedy to see our argument they're making. They're making arguments here that were not arguments that Judge Lifland relied on, but they're saying, look, if you don't read it this way, there's no remedy.

But there is a remedy. The remedy is against the bank. To the extent that these indemnities are not enforceable, our banks are making these representations and they know who we are. So they don't need to know the name of the beneficial holders in order to enforce these clauses and to have a remedy. If they have an additional remedy against those parties, if they know there the bank may have a remedy against these parties because they both --

THE COURT: A remedy for what?

MR. MOLONEY: Their argument in their brief is this subscription agreement doesn't make sense because if they don't know they have indemnities that run to them and they have rights to run to them, if they don't know who to enforce them against, then there's no remedy.

THE COURT: If the agreement says the subscriber is subscribing both on its behalf and on behalf of the beneficial owner.

MR. MOLONEY: Correct. So the subscriber is on the hook, so they have that remedy. And then the offering memorandum, which we quote from on page 11 in detail, makes it clear that these -- that what we're dealing with here are basically OFAC regulations that are dealing with anti-money laundering situations and that are dealing with terrorist situations. And it also provides the specific remedy that the fund has against the beneficial holder in the event that it becomes uncomfortable with having a beneficial holder, doesn't feel it has enough information about the holder. It says it can give them back their money or freeze their redemption. It doesn't say it can compel their identity. It does -- so that does not provide that remedy.

To go back, and I apologize for my statement that I don't know how I could read it this way on the OFAC provision. This is a standard provision, your Honor. There will be no more bank secrecy cases if this OFAC provision -- which is going to be in every single agreement that banks enter into all over the world post 9/11 -- if that provision meant that all bank secrecy is waived, then there are no more bank secrecy statutes; or that the US policy, which this provision strongly enforces, being able to make sure we can enforce OFAC rights,

will not be as respected as it is right now. So I think that this interpretation is potentially extremely dangerous for US interests.

THE COURT: Okay. Mr. Molton, Ms. Orenstein?

MR. MOLTON: Your Honor, Ms. Orenstein is going to cover this.

MS. ORENSTEIN: All right.

THE COURT: Counsel says he doesn't know how it could be read this way. And, I must say, seeing the headings does tend to color one's view of this.

MS. ORENSTEIN: Understood. And I'm going to -- I am eager to demonstrate for you how.

THE COURT: I can hardly wait.

MS. ORENSTEIN: So I would just like to take us through a few different provisions of the agreement.

THE COURT: Yes, ma'am.

MS. ORENSTEIN: And I have Exhibit 45, which is the Banco Santander. If it's convenient to the Court, I'll hand it up.

THE COURT: I have it already.

MS. ORENSTEIN: All right. I'd first like to start with paragraph -- well, first of all, just to take you to the end of the agreement, page 10 we see that Banco Santander Suisse is identified as the actual subscriber. And on the following page, or the very last page of the document, we have

what appears to be two authorized signatories who signed for Banco Santander as subscriber.

THE COURT: So why do I care?

MS. ORENSTEIN: Keeping in mind Banco Santander is the subscriber, we then turn to paragraph 27 of the agreement. If subscriber is a representative. If subscriber is subscribing as trustee, agent, representative or nominee of another person, defined as the beneficial shareholder, subscriber agrees that the representations and agreements herein are made by subscriber with respect to itself and the beneficial shareholder.

We think that this provision is of critical importance. Why is that? We believe that pursuant to this provision, that each and every other agreement and representation of the agreement which is made binding upon and pertains to the subscriber thereby becomes binding upon and pertains to the beneficial holder.

So how does this operate? Looking now back at the beginning of the agreement, at paragraph 1 thereof, we see that the final sentence of that paragraph provides that the subscriber subscribes for the shares pursuant to the terms herein the memorandum, which is a reference to the private placement memorandum and the funds' other organizational documents.

And we interpret that provision, then read in

conjunction with paragraph 27 of the agreement, to mean that the beneficial holder likewise subscribes, pursuant to the terms of this agreement and the other instruments.

We then go down to paragraph five of the agreement. We come to a series of representations. There are several enumerated paragraphs here, and they cover actually a broad swath of territory. Section 5A contains a representation that subscriber is not a US person under regulation S of the SEC. As we interpret this provision, it includes a representation that, likewise, the beneficial holders are not US persons for purposes of regulation S. And I believe it to be the case under our securities laws that it would be improper for a non-US person to, in effect, shield the identity of the beneficial holders who were US persons in order to take advantage of this representation.

That representation is then followed by a series of other representations that are of great significance in establishing the eligibility not only of the subscriber, but also of each beneficial holder to invest in the fund. So we have the commodity and exchange representation, which is somewhat similar to the reg. S representation. Then we have an eligibility criteria under 5C that is established under BVI law, pursuant to which the professional investor -- the investor must have professional status.

Continuing through the document, we then see other

representations contained in paragraph seven. One of them pertains to the receipt and having -- the receipt, the understanding, the comprehension of the subscriber of the fund documents. And we would submit again, by operation of 27, that this is intended to be binding upon the beneficial holder and to preclude certain kinds of lawsuits that would be precluded by acknowledgment of having read the fund materials and accepted the risks that were stated therein, and that these provisions were significant and concluded for that purpose and are binding on the beneficial holders.

Paragraph 8 is somewhat similar. It's a representation regarding subscriber's sophistication and financial condition. We think it is the only logical reading of the agreement that representations with respect to subscriber sophistication and financial condition were intended to be made by the beneficial holder.

THE COURT: I get the point.

MS. ORENSTEIN: Okay. We get to the point, your Honor, the point is found in paragraph 29 of the agreement, pursuant to which we get an answer to the question of, well, what does the fund do about all of this if it needs to establish the eligibility not merely of its subscribers but also of its beneficial holders?

Paragraph 29 of the agreement provides that the fund may request from the subscriber such additional information as

it may deem necessary to evaluate the eligibility of this subscriber to acquire shares, and may request from time to time such information as it may deem necessary to determine the eligibility of subscriber to hold shares or to enable the fund to determine its compliance with applicable regulatory requirements or its tax status. And the subscriber agrees to provide such information as may reasonably be requested.

This provision is not narrowly related to OFAC, but this is intended to enable the subscriber essentially upon -- not the subscriber, to enable the fund essentially, upon request, to obtain whatever information it needs to ascertain the eligibility of the subscriber and the beneficial holder, because --

THE COURT: So which eligibility requirement are we under here?

MS. ORENSTEIN: We are not under any eligibility requirement here. The point I'm making is not that pursuant to these proceedings we are seeking specific performance of the subscription agreement. Our point is different than that.

Our point is that if you look at the foreign bank secrecy laws, you see that the purpose of those foreign bank secrecy laws is to entrust confidential information. And it's to protect the secrecy of confidential information. What is confidential information? Very often these bank secrecy laws are less than completely lucid as to what it is. But as I

understand it, it encompasses information that the banks are either entrusted with by their customers, or that the banks come to know by virtue of the customer relationships, that the banks are not free to disclose to third parties. That is the essence of confidentiality. It's the entrustment of information that is subject to -- that is a purpose other than for disclosure, and, in fact, where it's understood that that information cannot and will not be disclosed.

And so the significance of the subscription agreement and these provisions is not that we're seeking to enforce the subscription agreement in these proceedings; it goes to the very heart of whether or not the provision of this information pursuant to -- which was whether this information fits within the definition of confidential, secret, protected information under the various foreign privacy laws that have been invoked by the defendants.

THE COURT: Then why are you reading me all this? I'm not sure I get the connection between the two.

MS. ORENSTEIN: The connection goes back to what I was addressing before, and that is the issue of whether the Court committed legal error by not reaching the issue of comity and whether or not the Court was correct in finding that the defendants had failed to meet their burden to show --

THE COURT: Are you arguing that paragraph 29 is a consent or a waiver?

MS. ORENSTEIN: I'm arguing that paragraph 29 must be considered by any foreign law declarant in an opinion that is a finding that there is a conflict between foreign law and --

THE COURT: Why is it relevant to this case? The information is not being sought to evaluate the eligibility of the subscriber to acquire shares. Then why is it -- I don't see why it's relevant.

MS. ORENSTEIN: It's relevant to the nature of the information that the banks have, which they're saying --

THE COURT: I don't know what that means.

MS. ORENSTEIN: It's relevant to whether that information that they possess about the beneficial holders of the shares is confidential information or secret information.

THE COURT: How is it relevant?

MS. ORENSTEIN: Where a party imparts to a bank or the bank comes into information in a context which would not preclude its further disclosure, I submit there's a substantial issue under the foreign law statutes that have been cited here as to whether that information comes within the purview of the foreign bank secrecy laws.

THE COURT: You haven't answered my question as to why paragraph 29 is relevant to anything.

MS. ORENSTEIN: Paragraph 29 is binding upon each beneficial holder --

THE COURT: Nobody is arguing that. Why is it

relevant to this case?

MS. ORENSTEIN: Because each beneficial holder, by authorizing the defendant subscriber to enter into this agreement on its behalf, contemplated the possibility of further disclosure of the information.

THE COURT: Sure, but what further disclosure? Disclosure, quote, necessary to evaluate the eligibility of the subscriber to acquire shares. And by reading subscriber I mean to include beneficial holder. How is that relevant here?

MS. ORENSTEIN: I would submit that the issue of whether a foreign party who agrees to the use of their confidential information for any purpose in connection with a commercial transaction raises an issue of waiver and consent --

THE COURT: Counsel, counsel, they didn't agree for any purpose. They agreed to disclose such information as may be deemed necessary to evaluate the eligibility of the subscriber or the beneficial holder to acquire shares. That's not what we're doing here, is it?

MS. ORENSTEIN: I agree, your Honor. That's not what we're doing here.

THE COURT: Then why do I even care about this?

MS. ORENSTEIN: I'm struggling to explain my point --

THE COURT: I know that. There's a reason for that, counsel.

MS. ORENSTEIN: When I look at the definitions under

the foreign law statutes and they talk about secrets, to my mind, when somebody has agreed can be disclosed for any purpose.

THE COURT: But that ain't this. What we're talking about here ain't this. So it's irrelevant.

Okay, next? Is there more?

MS. ORENSTEIN: No, your Honor.

THE COURT: Okay. Did you want to speak at all about the subscription agreement or the private placement memorandum which the bankruptcy court relied on, anybody? Anybody at the plaintiff's table?

MR. MOLTON: Yes.

THE COURT: Yes, sir.

MR. MOLTON: Judge, just to take what Ms. Orenstein says, I think that what she's trying to say is that by entering into this agreement, and by authorizing the subscriber, the named subscriber to enter into this agreement in the context of the entire transaction documents -- and I know Mr. Moloney showed you the PPM, but the PPM is clearly worded in a way that says, hey, by the way, to the extent that the funds need information, you're going -- you know, that information is subject to disclosure.

THE COURT: It doesn't actually say, to the extent the funds need information. It talks about as part of the funds or the administrator's responsibility for the prevention of money

laundering. That's what it says. How is that this? How is this that?

MR. MOLTON: Investment manager, page 25. And I know you have it in front of you.

THE COURT: I have it right here.

MR. MOLTON: Reserves the right to request such information that's necessary to verify the identity of a subscriber and underlying --

THE COURT: Do you want this taken down?

MR. MOLTON: No, it's okay.

THE COURT: Well, you don't have to take it down, Ms. Reporter. That's okay.

MR. MOLTON: No, Judge -- I'm saying in the context of all the transaction documents, a beneficial owner understands that by subscribing and by investing in the Fairfield funds for that point would appear to be a very lucrative investment in Madoff, they were basically consenting to their identities and certain information being disclosed for a host of purposes. I believe your --

THE COURT: But none of them is the purpose you have here.

MR. MOLTON: Well, the purpose we have here, Judge, is to find out who our beneficial owners are.

THE COURT: Doesn't say that. Show me where it says that. It says as part of the fund or the administrator's

responsibility for the prevention of money laundering. And the subscription agreement language that you rely on is in the Office of Foreign Assets Control portion. It says nothing about general disclosure.

MR. MOLTON: Your Honor, if your Honor is going to read those agreements in the context of all those provisions, and what --

THE COURT: Tell me what I'm missing. Tell me why I'm wrong.

MR. MOLTON: I think, your Honor, in the context of reading the entire agreement and giving fair weight to each and every provision, as you must do --

THE COURT: Tell me what I'm missing.

MR. MOLTON: You're missing the general tenor that the beneficiary understands that his, her, its identity is subject to disclosure.

THE COURT: Under certain terms and conditions to determine whether or not the beneficial owner is eligible to subscribe, to counter money laundering and to counter terrorism, is what I find. Tell me where I'm wrong.

MR. MOLTON: On page -- paragraph 22, your Honor.

THE COURT: Of which, please, sir?

MR. MOLTON: Of the main subscription agreement.

THE COURT: Yes, sir.

MR. MOLTON: The fund may disclose the information

about subscriber that is contained herein as the fund deems necessary to comply with any applicable law as required in any suit, action or proceeding.

THE COURT: Okay.

MR. MOLTON: And, Judge, if the bottom line is that you're looking for a provision that says in the context of a suit by the funds and/or the liquidator for overpayment of --

THE COURT: I'm not looking for that.

MR. MOLTON: It's not there.

THE COURT: Of course not. I don't disagree with you, counsel. But the question is: Is there any consent to disclosure that is not cabined by eligibility -- the purposes, eligibility to invest, anti-money laundering, antiterrorism?

MR. MOLTON: Paragraph 22, your Honor, I believe sets forth a general --

THE COURT: Okay. Mr. Moloney, counsel says paragraph 22.

MR. MOLONEY: Let me first address 22. And if I can, I'd like to take a step back, too.

THE COURT: Okay. Let's hear 22 first.

MR. MOLONEY: First start with 22. That says that any information they have they can disclose. I don't have a problem with that. They don't have the information. That's why we're here.

THE COURT: Mr. Molton? I thought that would take

longer, but okay.

MR. MOLTON: Judge, again, I think, read in the context of the entire agreement, this agreement -- this would be superfluous, this provision. It would be a nullity with respect to beneficial owners, if Mr. Moloney's very restricted reading of it is correct. What it would mean is that we would have no way -- the funds would have no way, as required in any suit, action or proceeding, to disclose or to discover the identity of beneficial holders for the purpose of complying with this provision.

Again, going back to what Ms. Orenstein said, the subscriber subscribes on behalf of the beneficial owner --

THE COURT: I got that.

MR. MOLTON: -- as if they are the beneficial owners --

THE COURT: I understand that.

MR. MOLTON: So what Mr. Moloney and his argument is basically asking your Honor to accept is that this agreement, this agreement provides no consent by the beneficial owner to have its identity made known to the fund for any --

THE COURT: Yeah, it does. Any purpose other than --

MR. MOLTON: For any purpose other than whatever your Honor --

THE COURT: Eligibility.

MR. MOLTON: Eligibility.

THE COURT: Anti-money laundering --

MR. MOLTON: Yeah. And I don't think you can read this -- I think any -- now, Mr. Moloney talked about, you know, what goes on in banking history and what should be surmised. So I'm going to take his lead and tell --

MR. MOLONEY: I thought I gave a very short answer, your Honor.

THE COURT: I know. Come on. This is important.

MR. MOLTON: The bottom line is that any subscriber who reads these documents, who reads the PPM, who understands, reads all these provisions, much -- some of them standalone, clearly understands that they are consenting to disclosure of certain information on the fund's request. I don't think it's a fair reading --

THE COURT: It doesn't say that here. That's not what paragraph 22 says.

MR. MOLTON: No, but I think the fair implication of it, as I just said, paragraph 22 in the context of the agreement as a whole provides the funds with an opportunity to obtain information as to --

THE COURT: It doesn't say attain.

MR. MOLTON: I understand.

THE COURT: Let's assume that we incorporate subscriber and/or beneficial owner. It still doesn't say that the funds may compel the disclosure of information from the

beneficial owners or about the beneficial owners.

MR. MOLTON: Judge, I think that's a fairly restricted reading of a number of transaction documents.

THE COURT: Tell me what I'm reading wrong.

MR. MOLTON: You're right. It doesn't say that, Judge. I agree. It says the fund may disclose information about subscriber that is contained herein and is deemed necessary to comply with applicable laws required --

THE COURT: Well, compare it, please, to paragraph 29. The fund may request from the subscriber such additional information as it may deem necessary to evaluate the eligibility of the subscriber to acquire shares. That's where we're finding out that the fund may request, but it doesn't say that in 22.

MR. MOLTON: No, it doesn't. And what I'm saying, your Honor, and I've said --

THE COURT: Who drafted these documents? The fund.

MR. MOLTON: These documents were no doubt drafted by the fund, I am sure.

THE COURT: None of the lawyers in this room, I trust.

MR. MOLTON: Maybe we won't go there. I don't know, Judge.

THE COURT: I'm not criticizing the documents. Go ahead.

MR. MOLTON: But in any event, I mean, I could say it

five times, so I'm not going to belabor the point anymore.

THE COURT: I have the point.

MR. MOLTON: The bottom line is, as required to give every provision meaning in this --

THE COURT: I got it.

MR. MOLTON: -- complicated transaction that not only involves a subscription agreement but involves as well, going back to first principles of contract construction, what we're doing here is not looking at the whole, which basically says, in order to conduct its business, the fund may have a need to require disclosure of beneficiary identity or information.

THE COURT: For certain purposes.

MR. MOLTON: There were a number of purposes there, but I don't think you can read 22 -- if you read it that 22 merely says that the only way I can get the information that I'm seeking to or need to disclose is that I'm unable to get it other than through the one, two, three specific provisions that are contained in this paragraph, I believe renders 22 a nullity, given its very broad wording. It's clearly contemplating a situation like a litigation, where the fund has to disclose the identity or is compelled to disclose the identity of its beneficial holders. Put this litigation on the side, forget about it, any litigation, any issue, wherever. And what you're doing here is really taking the ability of the fund and the meaning of this provision totally and eviscerating

it, if we're saying the only way you can get that information is through one, two, three.

I think, again, a fair reading of the agreement of the whole, and giving force to its context and to the natural understandings that flow from this agreement, clearly envisioned and contemplate that a beneficial owner who decides to give their money to one of these banks for investment in Madoff clearly understands that they're subjecting themselves to disclosure for a number of reasons not necessarily limited to A, B and C.

THE COURT: Okay.

MR. MOLTON: Thanks.

THE COURT: Mr. Moloney, counsel says that paragraph 22 is a nullity if it is interpreted in the manner you suggest.

MR. MOLONEY: Your Honor, if I can address that briefly. I think this provision --

THE COURT: That's why I asked you.

MR. MOLONEY: -- is a shield rather than a sword. By that I mean that when the fund is required to disclose information in litigation and has the information, it's ample to do so. And it's quite clear it says the fund may disclose the information about the subscriber that's contained herein. And I don't think the fact that the subscriber commits to -- on behalf of itself and on behalf of beneficial holder means that every time you see the word subscriber here, you read

beneficial holder, because --

THE COURT: I'm just assuming it for the purposes of argument here.

MR. MOLONEY: But I think as a matter of reading the contract as a whole, I think the word here means -- subscriber means person who signed. And I think the way this provision works is if you read it in conjunction with the prior provision, 21, the anti-money laundering provision, it says, look, if the client appears on one of these OFAC list's bank, the qualified financial institution which the architecture of this agreement imposes a lot of obligations on, you have to report that. And then we, under 22, are free to report that to everyone else.

If the person doesn't otherwise qualify -- and this is where I would question your Honor's -- I think the cabining is more narrow than your Honor suggested. If the person just doesn't qualify but doesn't fall on an OFAC list, I believe 21, which is the specific provision dealing with what disclosures you make, says that in the event of -- you're not giving information, what the administrator may refuse to accept -- gives a whole bunch of remedies which the private placement memo also says which involve freezing the money or giving the money back. But I think the only circumstance where they actually could compel disclosure by the bank is if it's on an OFAC regulation. Doesn't really matter. It's immaterial,

because the other circumstance isn't met here either. They're not questioning that these people were eligible.

But I think if they have uncertainty about eligibility, I think their remedy is at that point to freeze the account or to give back the money. I think the only circumstance where they actually closely read in this agreement get to get the information from the banks automatically, including as a matter of right, is if it's on an OFAC list. And that's understandable, given this. Otherwise, the banks have an absolute obligation to indemnify them if it turns out that the beneficial holder doesn't meet these criteria, and the banks on the whole is on the hook for that. And they know who the bank is, because the bank signed it, Banco Santander has signed it and, therefore, they have a remedy against Banco Santander.

So the other point I make, just briefly, is that none of these provisions were argued to Judge Lifland. So in terms of my argument that Section 21 could not be read to protect their interests implicitly, the fact that we've now been traipsing through the agreement looking at all these other provisions means that Judge Lifland got this wrong. Now they're trying to find another provision as an after-fact, but 22 does not apply in this way. And I think holistically this whole arrangement doesn't make sense the way they're trying to advance it to you.

And I want to take it a step back to their holistic argument. Holistically, as that section of private placement memorandum I pointed you to, pages 25 and 26 again, sets up, they set up a dual regime. You either get the name of the investor, and that person fills out this form, which is on page 26, and gives them all this information so the fund can make sure they satisfy all these criteria, that's regime number one; or regime number two, which is what we're all involved in is that a qualified financial institution, a bank, gets this information and then makes reps and warranties to the funds.

The whole point of this was them not to find out the name of these beneficial holders and to respect these private bank secrecy laws. That's the whole point of this arrangement. If they thought they had this right to the beneficial holders, they wouldn't have this complicated arrangement. They would just have them sign the agreement and we wouldn't be here today.

MR. MOLTON: If I can, Judge.

THE COURT: Yes, sir.

MR. MOLTON: With all due respect to my friend Mr. Moloney, that's not how it worked. Basically these banks acted as broker -- not brokers but sellers of Sentry shares. They had their own interests and they made their own money.

THE COURT: Okay. How does that change?

MR. MOLTON: What Mr. Moloney said, just responding to

his last point, bottom line is that the banks themselves went out and sought customers for their own benefit.

THE COURT: Banks always seek customers.

MR. MOLTON: But just getting to -- I'm going to take what Ms. Orenstein tried to convey and maybe didn't come through, so I'm going to do my best to see if I can assist her and assist you, your Honor, because the issue also isn't whether the contract itself specifically allows or doesn't allow this specific use thereof. The issue is whether, under the applicable foreign secrecy law, right, the provision of information or disclosure of information disclosed a secret that was entrusted to that bank. What I think Ms. Orenstein was trying to --

THE COURT: I don't know why we're talking about this in light of the affidavits of the foreign law experts, which say if we turn over information responsive to the foreign discovery order, we'll all be shot, or whatever they say.

So why is there a question? I don't know why we're talking about this.

MR. MOLTON: Because what they're saying, Judge, what they're saying as a predicate to that is that the applicable law creates a liability for someone who intentionally divulges a secret entrusted to him or her her debt.

THE COURT: But all these foreign law guys are saying that the information required to be disclosed by the order at

issue is such information. It's information that we're not permitted to disclose under our laws.

MR. MOLTON: They're also saying, Judge, that -- and I think Ms. Orenstein can speak to the particulars -- that if there's a consent, that those issues go away.

THE COURT: Okay. So now we're back to looking at the documents.

MR. MOLTON: But the key is when -- but the provision that you're looking for that says we have the right to compel the disclosure of this particular piece of information doesn't necessarily, ipso facto, mean that the subscriber -- that the beneficial owners' provision of that information was done under the understanding that it would be a secret; meaning, your Honor, that the Swiss expert says Article 47 creates liability for any person who intentionally divulges a secret entrusted to him in his capacity as an officer, employee, agent or liquidator of the bank. If the beneficial owner is entrusting that information and knowing that that information is subject to disclosure, how is that a secret? There's been no showing other than conclusory statements.

THE COURT: No. The foreign law experts close the loop by saying disclosure of this information will subject the banks to criminal and civil liability. That's where the loop is closed.

And in your last statement you said something about

the beneficial holders having knowledge that the information could be disclosed. Well, yes, but under certain terms and conditions: Eligibility, anti-money laundering, etc., etc.

MR. MOLTON: Well, again, your Honor, I think that the way the agreement is structured, and for the reasons that I said, at least with respect to the bank's secrecy laws that are not the common law countries that are put on the side or the blocking statutes that were put on the side; put those on the side, and I hope we're not getting confused talking about those issues, because those issues raise different issues, that the bank subscribers themselves' disclosure of that information that was tendered to them, with full understanding that it could be disclosed for a host of reasons -- indeed, as I read the paragraph that we just spent a lot of time on, 27, I think it is -- you know, that there is an issue, your Honor, that the loop is not closed. There's no dispositive --

THE COURT: But you and I are sitting here speculating about that while the foreign law experts have given us their conclusions.

MR. MOLTON: Well, again, you're right, your Honor, they have. And the ones we're talking about talked about that.

THE COURT: Well, there's no other affidavit saying, no, that guy is wrong.

MR. MOLTON: Well, we're relying, your Honor, on the subscription agreements and the transaction documents.

THE COURT: I understand that, and that's why we spent a lot of time going over them.

MR. MOLTON: At least for the bank secrecy, the pure bank, the Luxembourg and Swiss, I think there is, and there may be a few others.

But that's our position. I don't know how many times I can come around it, and I don't want to beat a dead horse, but, you know, we really believe that the transaction documents, in sum or substance, contemplate, anticipate and many of the @privilege fence there and would be rendered superfluous. And it would lead to an absurd result that the funds themselves are limited to requesting the identities of their beneficial owners for the three -- we'll call it three --

THE COURT: That we've talked about.

MR. MOLTON: That's our position, Judge.

THE COURT: Thank you.

Mr. Moloney, anything else on the step back?

MR. MOLONEY: I'm sorry, on the step back?

THE COURT: You wanted to take a step back, and I think I forgot it.

MR. MOLONEY: Okay. I actually think I did that. When I wanted to step back, I was talking about the architecture of the entire agreement. You know, that it doesn't make -- it does make sense that this was set up to

permit these foreign secrets to be in accord with these foreign secrecy laws, with the one exception of OFAC, and banks understand that. And, therefore, they get themselves -- get consents related to OFAC from their customers. But they don't -- but they do not negate the entire regime of these 30 other countries.

THE COURT: Okay.

MR. MOLONEY: That's the only step back.

THE COURT: Anything else?

MR. MOLONEY: The only other thing I would say, your Honor, just skipping ahead to slide 18 of the last slide, this is the last point I would make, your Honor, which kind of goes to why not use the Hague Convention, which your Honor suggested.

I think we have here that the interests of the United States in this -- in facilitating any discovery here is very slight. The interest of the BVI is questionable, in light of the fact that your Honor observed the laws -- the law they're trying to move forward on has been rejected by the BVI courts. The trustee for the Madoff estate is following that route, and I think the fact that the trustee for the Madoff estate is following that route in each cases involving Fairfield is good evidence that this is a reasonable route to require them to follow. And I think that's the only -- unless your Honor has a question, that's all I would like to say.

THE COURT: I think I'm finished.

Mr. Molton, did you have something --

MR. MOLTON: I need to respond to that. Mr. Moloney knows that Mr. Picard has attempted to seek expedited discovery probably a month before us in front of Judge Lifland.

THE COURT: Month before we did.

MR. MOLTON: You're right, a month before we did, in front of Judge Lifland, and reached various agreements with various people.

Also, Mr. Picard does not have the benefit -- and I know we heard this last year, and I'm going to get back to it again -- does not have the benefit of the document we have whereby the defendants themselves, these very sophisticated international financial institutions, consented to the jurisdiction of the New York courts to resolve disputes regarding the agreement and the fund. And if Mr. Picard had that agreement, he might be doing something else. So Mr. Moloney's reference to what Mr. Picard is doing is really irrelevant, because he has a different situation than we do.

THE COURT: All right. Anything else?

MR. MOLONEY: Yes. Just very briefly on this last point about the agreement, we have a slide for that which is slide 8, your Honor. And this is part of why we sought the stay, frankly, in the bankruptcy court, your Honor, is that there's a bit of a shell game going on here, which is that

they're relying here in the United States on this provision, which we quote, that says that they can pursue -- if the action's with respect to this agreement and the fund, it can be brought in New York State court. And BVI, they're saying the actions they bring are not with respect to the subscription agreement but they're under the articles of association, which is why they're applying BVI law in the BVI; don't apply New York law here.

Now, we don't believe this provision applies. We don't believe this provision -- but I assume that's an issue that Judge Lifland will deal with on remand.

THE COURT: All right. Anything else, friends? Okay, be back in five.

MR. MOLTON: Judge, can I just do some clean-up points that may have nothing to do with the argument, but just clean-up points?

THE COURT: Sure.

MR. MOLTON: Number of things.

First of all, Judge, there's a number of joinders who filed papers who were not objectors below. And we don't think that they have any standing to have their -- now first instance objection considered by your Honor or be part of the order, any order your Honor may deliver. And I have a list of those. We can include those. So I think -- just trying to clean that up, Judge.

MR. MOLONEY: Your Honor, perhaps that can be read out loud, because these parties --

THE COURT: We'll just mark it.

MR. MOLTON: I can read it out loud, Judge. Okay. No. Would you like me to read the five out loud, Judge?

THE COURT: Sure. If that makes you happy.

MR. MOLTON: Well, Bank Vontobel AG; Falcon Private Bank; Incore, with an I, Bank AG; Lombardy Properties Limited; Zenit Alternative Investment.

The second point, your Honor -- something that wasn't really briefed but is part of the order and we don't think should be -- was at all a subject of the discussion or the attack is a second part of the order. We had asked in our motion to have an ability to amend complaints to include information that we developed independently of this disclosure order as to beneficial owners so that we get those in by the 22nd of July.

And also, we had delivered to the Court, pursuant to an agreement that we worked out, a schedule of amendments that include all sorts of other issues that would be included in the amended complaints. And Judge Lifland granted that part of our motion. And we would ask that that issue, which really hasn't been the subject of the appeal --

THE COURT: That's not even before me.

MR. MOLTON: But your Honor stayed the order in its

entirety.

THE COURT: All right.

MR. MOLTON: So we're prohibited from going forward on that.

THE COURT: I got it.

MR. MOLTON: So that's why I'm cleaning that up.

MR. MOLONEY: Your Honor, can I be heard on that one issue?

THE COURT: Sure. Let counsel get his laundry list out.

MR. MOLTON: Okay. And lastly, your Honor, your Honor talked about sequencing --

THE COURT: Yes, sir.

MR. MOLTON: -- in front of Judge Lifland. And that's something -- I mean, one of the things is we have a lot of people here but we do work very well together. So that's an issue that, if your Honor believes that that's something that the parties can discuss with Judge Lifland, that's something, if that's going to be part of an order that your Honor delivers, you know, we submit that that's something that the parties, with Judge Lifland's oversight and supervision, can work out in a way that corresponds to whatever your Honor delivers in your order. So that's my third point.

THE COURT: Thank you.

MR. MOLONEY: Very briefly, only as to the amendment

issue, your Honor, our position is that the only amendments that should be allowed with respect to those cases that are subject to the motion to remand are ones that relate to timeliness. I think they're just going to -- we've already filed two abstention motions against those documents. We really don't want to have to file a third motion. If it does relate to timeliness, we don't think they should be allowed to amend those complaints that are subject to our motion to remand back to state court.

THE COURT: All right. Anyone else? Anyone else? Counsel?

MR. LEVY: Your Honor, Sam Levy, counsel for Bank Vontobel. We're one of five that were just listed as not being objected.

Number one, that's not true. Bank Vontobel and Vontobel Asset Management, its subsidiary, did object.

Number two, Bank Vontobel AG hasn't even been served in this case, wasn't served with the motion papers, wasn't even properly served with a summons and complaint. So to the extent the Court is going to consider carving out those five entities who have made appearances and have joined in these objections, we want to be heard in that respect.

THE COURT: Thank you.

Who else, anybody?

Okay. Thank you, counsel. We'll be back in five

minutes.

(Recess)

THE COURT: When reviewing a decision of the bankruptcy court, this Court sits as an appellate court. It reviews the bankruptcy court's conclusions of law de novo but its findings of fact for clear error. *In re Quigley Co.*, 449 B.R. 196, 200-01 (S.D.N.Y. 2010) (citing *In Re Bayshore Wire Products Corp*, 209 F.3d 100, 103 (2d Cir. 2000.)) Questions about the bankruptcy court's subject matter jurisdiction and questions of statutory and contract interpretation are legal questions that are reviewed de novo. *In re Marconi PLC*, 363 B.R. 361, 363 & n.2 (S.D.N.Y. 2007).

Federal Rule of Civil Procedure 26(d)(1) does provide that a party may seek discovery before a Rule 26(f) conference "when authorized ... by court order." Generally, courts apply a reasonableness standard in determining whether to grant early expedited discovery. See *Ayyash v. Bank Al-Madina*, 233 F.R.D. 325, 326-27 (S.D.N.Y. 2005). This Court will assume without deciding for the purposes of this appeal that such discovery was at minimum "reasonable" in this case. This Court certainly has doubts about its reasonableness in light of the bankruptcy court's statement that such discovery was sought "because certain defendants have indicated that they intend to raise defenses on the grounds that they have acted solely as agents, trustees or custodians for beneficial holders, or that they

changed their positions by transmitting redemption payments to beneficial holders." See June 27, 2012 opinion at 2. Taking that statement as true, such discovery is, of course, merits related.

The Court is also troubled by the bankruptcy court's statement that such discovery is reasonable in this case because the foreign representative "has no other means of obtaining this information and absent production by the defendants, the litigation against the beneficial owners cannot proceed." See June 27, 2012, opinion at 3-4.

The foreign representative has always had the available procedures under the Hague Evidence Convention at his disposal, and his failure to utilize them certainly weighs on the reasonableness analysis. The Court will nonetheless leave that particular question of reasonableness for another day.

Where the Hague Evidence Convention does come into play, however, is in reviewing the bankruptcy court's grant of the foreign disclosure order that defendants assert will cause them to violate some 30 international banking privacy schemes. While the foreign representative claims that defendants have failed to establish a prima facie true conflict of laws, (see foreign representative's opposition brief at 17-26), it is clear from the bankruptcy court's opinion that the issue of a general waiver of such laws was dispositive. The bankruptcy court stated that defendants had "explicitly consented" to such

discovery, and that defendants' arguments were a "thinly veiled attempt to undo defendants' self-created dilemma arising from their consenting to provide the information the foreign representative seeks." June 27, 2012, opinion at 2, 5. Indeed, there is no discussion anywhere in the opinion of the bankruptcy court on the merits of the international law conflict outside the context of a waiver. In finding that such a general waiver existed, the bankruptcy court relied on two provisions common to all of the form subscription agreements in this case. The Court addresses each one in turn.

The bankruptcy court cites to a paragraph of the subscription agreements entitled "Office of Foreign Assets Control," which it and the foreign representative label the "disclosure consent provision." The subscription agreement to which the bankruptcy court cites is found in Exhibit A to the declaration of Shoshana Kaiser in support of the foreign representative's reply memorandum of law. (Bankr. ECF No. 747) at Tab 45. The Court assumes for the purpose of this appeal that the bankruptcy court intended to refer to paragraph 20(B) of that document, in which the cited language is found, rather than paragraph 21(B), which does not appear to exist.

Paragraph 20(A) states: Office of Foreign Assets Control. A, subscriber understands and agrees that the fund prohibits the investment of funds by any persons or entities that are acting, directly or indirectly, (i) in contravention

of any applicable laws and regulations, including anti-money laundering regulations or conventions; (ii), on behalf of terrorists or terrorist organizations, including those persons or entities that are included on the list of specially designated nationals and blocked persons maintained by the US Treasury Department's Office of Foreign Assets Control ("OFAC"), as such list may be amended from time to time; (iii) for a senior foreign political figure, any member of a senior foreign political figure's immediate family or any close associate of a senior foreign political figure, unless the fund, after being specifically notified by subscriber in writing that it is such a person, conducts further due diligence and determines that such investment shall be permitted; or (iv) for a foreign shell bank (such persons or entities in (i)-(iv) are collectively referred to as "prohibited persons.")

Paragraph 20(B) goes on to require that each subscriber warrant that neither it nor any entity controlling, controlled by or under common control with it is a "prohibited person" as defined in the preceding paragraph 20(A). Paragraph 20(B) then requires that to the extent any subscriber has beneficial owners, it makes identical representations based on its own due diligence about those beneficial owners, i.e., that any such persons or entities are not "prohibited persons" within the meaning ascribed to that term in the preceding

paragraph, 20(A).

Finally, paragraph 20(B), in language cited by the bankruptcy court, requires that each subscriber "holds the evidence of such identities and status and will maintain all such evidence for at least five years from the date of subscriber's complete redemption from the fund and ... it will make available such information and any additional information required by the fund, that is required under applicable regulations."

Tellingly, neither the foreign representative nor the bankruptcy court notes that this cited language is contained within a paragraph entitled "Office of Foreign Assets Control." Neither does the foreign representative nor the bankruptcy court concede that the disclosure requirement contemplated within paragraph 20(B) very clearly relates to beneficial owners' status as "prohibited persons" within the meaning of the preceding paragraph. Indeed, paragraph 20(C) goes on to describe the fund's options with respect to the disclosure of beneficial owner identities "if any of the foregoing representations, warranties or covenants ceases to be true or if the fund no longer reasonably believes that it has satisfactory evidence as to their truth."

It is clear that these three paragraphs, when read together, establish no more than a limited duty to disclose the identities of beneficial owners where any such owner is

reasonably believed to be a "prohibited person" within the meaning of paragraph 20(A). The suggestion of the foreign representative, as adopted by the bankruptcy court below, that the language in paragraph 20(B) contains a broad and unlimited waiver of international privacy laws for all purposes wrapped within a narrowly circumscribed duty to disclose is unsupportable. The Court need not resort to such canons of contract construction as the foreign representative advances on page 21 of his opposition brief where the text itself is not ambiguous. Moreover, even if this Court were to find that the subscription agreements were at all ambiguous, the Court would be constrained to construe any ambiguity against the fund as the drafter of this language. See, e.g. Fogarty v. *Near North Insurance Brokerage, Inc.*, 162 F.3d 74, 78, (2d Cir 1998) (discussing contra proferentem document in contract construction).

The bankruptcy court then cites to a paragraph of the subscription agreements entitled "If Subscriber is acting as a Representative" which it labels the "Beneficial Shareholders' Consent Provision," and the foreign representative refers to as the "Requisite Authority Representation." June 27, 2012, opinion at 6; foreign representative's opposition brief at 17.

Again, the subscription agreement to which the bankruptcy court cites is found in Exhibit A to a declaration of Shoshana Kaiser in support of the foreign representative's

reply memorandum of law. (Bankr. ECF No. 747) at Tab 45. This Court assumes for the purpose of this appeal that the bankruptcy court here intended to refer to paragraph 27 of that document in which the cited language is found, rather than 28, which is entitled "Country Specific Disclosures."

Paragraph 27 states in pertinent part: If subscriber is subscribing as trustee, agent, representative or nominee for another person (the "beneficial shareholder"), subscriber agrees that the representations and agreements herein are made by subscriber with respect to itself and the beneficial shareholder. Subscriber has all requisite authority from the beneficial shareholder to execute and perform the obligations hereunder.

The Court finds this boilerplate provision to set forth the uncontroversial proposition that, to the extent any subscriber signs this agreement as the agent of another entity, it does so with the full authority to bind the principal to the representations and agreements made therein. There is nothing in this language that constitutes a general waiver of foreign privacy laws, and because the Court has already determined that paragraph 20(B) contains no general waiver, paragraph 27 does not codify one by implication. If anything, paragraph 27 merely affirms that the beneficial shareholder is bound by the limited duty to disclose described above.

The foreign representative has not and cannot invoke

that limited duty here. The foreign representative argues in his papers that "if, in fact, the fund has no right to disclose the identity of beneficial shareholders, this would lead to the absurd result that notwithstanding the requisite authority provision, the panoply of contractual rights that are conferred on the fund by virtue of that provision would be entirely illusory." (Foreign representative's opposition brief at 18-19). The Court must reject this proposition, as the foreign representative does possess the entirety of the limited right to disclose for which the fund has contracted. Any disclosure that can be achieved by pursuing the Hague Evidence Convention protocols (and thereby avoiding the conflict of laws at issue here), and whatever disclosure may be achieved on the consent of the parties. I also note, as set out in oral argument here today, that the funds also have contractual rights against the subscribers.

For these reasons, the Court holds that the bankruptcy court's finding of a broad general waiver of the international banking privacy laws invoked in this case, based on those sections of the subscription agreements cited below, to be erroneous on de novo review.

Now, the foreign representative points to another possible source of the broad waiver it asserts in this case. He notes what he refers to as "unequivocal standalone" language in the Fairfield Sentry private placement memorandum, as

incorporated into the subscription agreements, conferring an unqualified right to the identity of a beneficial owners. (Foreign representative's opposition brief at 20.) The private placement memorandum can be found in Exhibit 2 to the declaration of Kerry L. Quinn in support of foreign representative's opposition brief, and the relevant language in Exhibit A to the Krys, K-R-Y-S?

MR. MOLTON: Krys.

THE COURT: Thank you. -- declaration at page 25 contained therein. The Court first observes that neither the private placement memorandum nor the language contained therein was cited by the bankruptcy court as a basis for decision. The Court will address it briefly, however, in the interest of thoroughness.

As cited in the foreign representative's brief, this language states: "The investment manager reserves the right to request such information as is necessary to verify the identity of the subscriber and the underlying beneficial owner of a subscriber's or a shareholder's shares in the fund." (Foreign representative's opposition brief at 20). A cursory review of the private placement memorandum itself, however, quickly reveals that this language is anything but unequivocal or standalone. Indeed, it is tucked within the section of the memorandum entitled "anti-money laundering regulations" and is immediately preceded by the following language:

As part of the funds or administrator's responsibility for the prevention of money laundering, the investment manager and its affiliates, subsidiaries or associates may require a detailed verification of a shareholder's identity, any beneficial owner underlying the account and the source of the payment. This is found in the same spot in the papers as I just noted, but with emphasis added.

This same important qualification can be found in the subscription agreement itself at paragraph 21. The Court does not understand the foreign representative to be invoking the fund's responsibility for the prevention of money laundering in requiring this disclosure. And indeed, he's confirmed that today. So it's therefore unsurprising that the bankruptcy court did not rely on this qualified language as a basis for decision below. Any argument that this language standing alone constitutes a broad general waiver of all international banking privacy laws is without merit. And thus, the bankruptcy court's finding to that effect is clear error.

Although not a basis for decision in the bankruptcy court, the foreign representative's counsel points today at oral argument to two additional provisions in the subscription agreement: Paragraphs 22 and 29.

Paragraph 22 states the fund may disclose the information about subscriber that is contained herein as the fund deems necessary to comply with applicable law or as

required in any suit, action or proceeding. That provision, however, does not give the funds the power to force disclosure of information by the beneficial holders. It only gives the fund the right to disclose "the information about subscriber that is contained herein." That is, in the subscription agreement. Even if the subscriber in that sentence can be interpreted as including beneficial holders, it still does not give the funds the right to compel and then disclose the information required in the foreign disclosure order.

Similarly, with respect to paragraph 29, which provides only a limited right for information, that paragraph states "the fund may request from the subscriber such additional information as it may deem necessary to evaluate the eligibility of the subscriber to acquire shares and may request from time to time such information as it may deem necessary to determine the eligibility of the subscriber to hold shares or to enable the fund to determine its compliance with applicable regulatory requirements or its tax status, and the subscriber agrees to provide such information as may reasonably be requested.

Thus, paragraph 29, again, only gives the fund the right to require certain limited information; that is, information "necessary to determine the eligibility of the subscriber to hold shares or to enable the fund to determine its compliance with applicable regulatory requirements or its

tax status." None of those issues is in question here, and such information is not the information that is required to be disclosed by the foreign disclosure order. Accordingly, I reject the foreign representative's reliance on paragraphs 22 and paragraph 29 of the subscription agreements.

The Court concludes that the bankruptcy court's error as to waiver is indeed reversible error. The foreign representative argues that even if this Court should conclude that a comity analysis is required, such an analysis would lead to the conclusion that the bankruptcy court's order should be upheld and, therefore, a reversal is not required (foreign representative's opposition brief at 26).

This Court cannot agree. As noted earlier, it's clear that the waiver issue was the sole basis for the bankruptcy court's merits rule. Its opinion gives this Court no other findings as to the existence of a true conflict of law or the result of a comity analysis, should it undertake one. Because this Court does not have the benefit of the bankruptcy court's reasoned analysis, this case is unlike *In Re Vivendi Universal SA Securities Litigation*, 618 F.Supp. 2d 335 (S.D.N.Y. 2009), to which the foreign representative cites, in which the district court held that a magistrate judge's misapplication of French law did not result in reversible error where the comity analysis on the whole remained correct. See *Id.* at 341.

The foreign representative's arguments regarding the

existence of a true conflict, the applicability of foreign "blocking" statutes in a comity analysis, the need for individualized analysis of the foreign banking privacy regimes, and the like, are properly questions for the bankruptcy court on remand. When reviewing a decision of the bankruptcy court, this court sits as an appellate court. Accordingly, it is preferable for the bankruptcy court to address the issues raised in the foreign representative's opposition brief as to the comity analysis in the first instance.

The Court now addresses the defendants' second grounds for appeal: That the bankruptcy court erred in declining to resolve the issues of subject matter jurisdiction, personal jurisdiction and abstention on remand from this court, prior to issuing the foreign discovery order pursuant to Federal Rule of Civil Procedure 26(d)(1).

At the outset a clarification is necessary. While it is true that this case was remanded to the bankruptcy court for a determination on, inter alia, mandatory abstention, that remand was not a statement by this Court that "related to" jurisdiction could or should be presumed in this case (see foreign representative's opposition brief at 29). Nor does the Court of Appeals ruling in *S.G. Philips Constructors, Inc. v. City of Burlington*, 45 F.3d 702 (2d Cir. 1995) compel that presumption. In fact, this Court specifically stated in its opinion at page 39 that "here, the Chapter 15 proceedings are

ancillary to the BVI proceedings," and "the right of recovery is not provided by federal bankruptcy law." Defendants have since received a favorable final judgment in those same BVI proceedings, and that judgment has been affirmed on appeal. Defendants have also consistently argued that the jurisdictional ground in 28 U.S.C. Section 1334(b) does not include Chapter 15 cases within the scope of "related to" jurisdiction. Ultimately, resolution of both the underlying question of subject matter jurisdiction and subsequent question of mandatory abstention lie in the bankruptcy court. This Court's prior remand does not presuppose the bankruptcy court's conclusion on the merits of defendants' subject matter jurisdiction challenge, but merely directs that should the bankruptcy court find "related to" jurisdiction exists, it must also undertake mandatory abstention analysis.

As to jurisdiction generally, the Supreme Court of the United States has stated that "the requirement that jurisdiction be established as a threshold matter 'springs from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" See *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). While defendants are certainly correct that "jurisdictional questions ordinarily must precede merits determinations in dispositional order," see *Sinochem*

International Co. Limited v. Malaysia International Shipping Corp., 549 U.S. 422, 431 (2007), the Supreme Court has also said that there is no "mandatory sequencing of jurisdictional issues." See *Ruhrgas AG v. Marathon Oil Company*, 526 U.S. 574, 584 (1999). It would also appear that the *Enron* and *Morgan Stanley* cases cited by the bankruptcy court below at page 4 do establish a precedent in the bankruptcy court from the Southern District of New York of permitting such expedited discovery where pending statutes of limitation and possible agency defenses are at issue. The Court observes, however, that neither the Enron nor the Morgan Stanley case involved an ongoing challenge to the subject matter jurisdiction of the bankruptcy court as here.

The Court is aware of those cases which have affirmatively permitted discovery in advance of resolving jurisdictional issues. In *Sinochem*, for example, the Supreme Court described forum non conveniens as "a nonmerits ground for dismissal," and held that "a district court, therefore, may dispose of an action by a forum non conveniens dismissal by passing questions of subject matter and personal jurisdiction when considerations of convenience, fairness and judicial economy so warrant." See *Sinochem*, 549 U.S. at 432. Similarly, the Court of Appeals has held that jurisdictional discovery itself may be appropriate where the defendant challenges jurisdiction in order to help the Court resolve that

issue. See *Lehigh Valley Industries Inc. v. Birenbaum*, 527 F.3d 87, 93 (2d Cir. 1975).

Whatever this Court's intuition about the wisdom of ordering expedited Rule 26 discovery prior to resolving threshold jurisdictional issues, this Court declines the invitation to view the cases just cited as an exhaustive list of occasions on which a federal court may bypass jurisdictional questions. To the extent a bright line exists on this question, it appears to be that set out in *Sinochem*: "Jurisdictional questions ordinarily must precede merits determinations in dispositional order." Even if the foreign disclosure order is arguably "merits related", it is not itself a decision on the merits such as would violate the Supreme Court's mandate in *Sinochem*.

Therefore, defendants have not demonstrated that the bankruptcy court committed reversible error merely by issuing the foreign disclosure order pursuant to Federal Rule of Civil Procedure 26 prior to resolving challenges to subject matter jurisdiction, personal jurisdiction and abstention. Moreover, because the memorandum opinion and order of the bankruptcy court has already been reversed in large part and remanded for the reasons stated, it permits the Court to avoid reaching a question of a constitutional nature, which is advisable whenever it is possible. See, e.g. *Allstate Insurance Co. v. Serio*, 261 F.3d 143, 149-50 (2d Cir. 2001) ("It is axiomatic

that the federal courts should, where possible, avoid reaching constitutional questions.") (citing *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1994)).

Accordingly, for the reasons set out above, the June 27, 2012, order of the bankruptcy court is reversed, to the extent set out in the matter remanded to the bankruptcy court. This Court's stay of proceedings is lifted as to those portions of the June 27, 2012, order not affected by today's ruling.

The motion to clarify that the foreign disclosure order only applies to certain parties who signed subscription agreements is denied as moot, in light of the reversal of the foreign disclosure order.

The motion for mandamus is denied.

The motion to dismiss for lack of subject matter jurisdiction is denied without prejudice to the bankruptcy court's ruling on the motion in the first instance.

The motion with respect to the joinder issue raised by Mr. Molton at the end of our argument is not reached, in light of the reversal of the foreign disclosure order. And the Court agrees with the foreign representative that a proper ordering of the jurisdictional and other issues on remand is something that the bankruptcy court and the parties can confer about with an eye toward the "just, speedy and inexpensive" resolution of matters contemplated in Federal Rule of Civil Procedure 1.

Counsel, have I forgotten anything?

MR. MOLTON: Judge, just to be clear, with respect to those folks who didn't object to the disclosure order or didn't take appeal or join in connection therewith, does the --

THE COURT: The order is reversed as to one, it's reversed as to all.

MR. MOLTON: I just wanted to make sure we didn't get into a trouble where we'd have to come back for clarification.

THE COURT: Anything else, counsel?

Thank you, ladies and gentlemen. Thank you for putting your papers in in such quick order, friends.

(Adjourned)